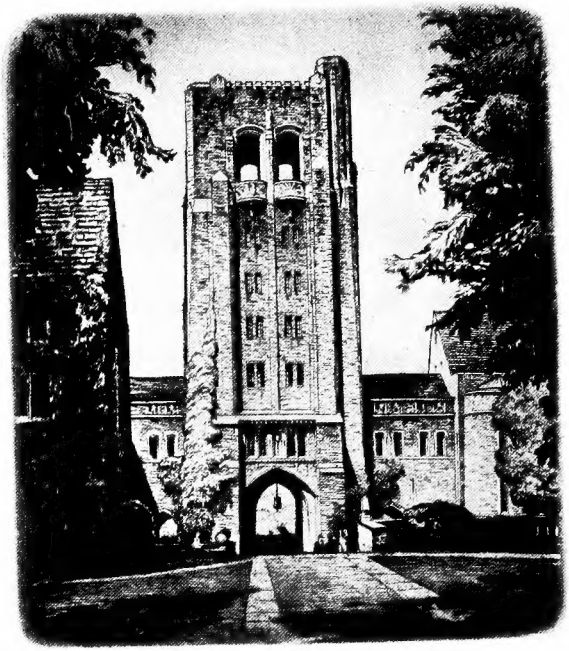


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THE LAW OF

REAL PROPERTY

AND

DEEDS

BY ROBERT T. DEVLIN
UNITED STATES ATTORNEY, SAN FRANCISCO, CAL.
AUTHOR OF "THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES."

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THE LAW OF DEEDS.

CHAPTER XXXIV.

RESERVATION OF VENDOR'S LIEN IN DEED.

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§ 1231. Equitable mortgage.—The reservation of a lien in the deed by the grantor is the creation of an equitable mortgage; when the deed is recorded, every one is bound to take notice of such lien.[1] Such a lien is assignable, and

[1] Webster v. Mann, 52 Tex. 416; Davis v. Hamilton, 50 Miss. 213; Ufford v. Wells, 52 Tex. 612; Stratton v. Gold, 40 Miss. 778; Baker v. Compton, 52 Tex. 252; Hall v. Mobile etc. Ry. Co., 58 Ala. 10; Caldwell v. Fraim, 32 Tex. 310. See, also, McKeown v. Collins, 38 Fla. 276, 21 So. 103; Atlanta etc. Co. v. Haile, 106 Ga. 498, 32 S. E. 606; Talbot v. Roe, 171 Mo. 421, 71 S. W. 682; Gordan v. Johnson, 186 Ill. 18, 57 N. E. 790; First Nat. Bank v. Edgar, 65 Neb. 340, 91 N. W. 404; Honaker v. Jones (Tex.) 113 S. W. 748. A purchaser at a sheriff's sale will take only an equity of redemption: Davis v. Hamilton, 50 Miss. 213.

where a grantor reserves in his deed a "lien on the described and granted premises for the faithful and full payment of the several notes described therein, with all interest," and transfers the notes to another, "with the lien retained by him on the lands therein specified," the purchaser can enforce the lien against the grantee.[2] A lien, expressly reserved, continues in force until released of record, discharged by payment of the lien debt, or barred by limitations.[3] It may be lost however, by failure of the vendor's title.[4] If it is not expressly reserved, it is not enforcible against subsequent purchasers without notice.[5]

§ 1232. **Payment in specific articles.**—As a lien of this kind is an equitable mortgage, the rights of the grantor and grantee depend upon the terms of their contract, and are not conferred by mere implication of law. The lien may be security for the performance of any act agreed upon by the parties, and not alone for the payment of money. Where a person sells land, and the grantee executes his note therefor for a certain sum of money, and it is agreed at the time of the execution of the note that it may be paid in lumber at a stipulated price, and the grantee fails to pay the money or deliver the lumber, the grantee may enforce the lien, as

[2] Stratton v. Gold, 40 Miss. 778. This lien is superior to a subsequent mortgage executed by the vendee: Louisville Building Ass'n v. Korb, 79 Ky. 190. See sec. 1243, post.

[3] Hamilton's Exr's v. Wright (Ky.) 87 S. W. 1093.

[4] Williams v. Finley (Tex.) 90 S. W. 1087.

[5] Neff v. Elder, 84 Ark. 277, 105 S. W. 260, 120 Am. St. Rep. 67. That purchaser from vendee in possession under unrecorded deed, reserving lien, is bound to take notice thereof, see Gilbough v. Runge, 99 Tex. 539, 91 S. W. 566, 122 Am. St. Rep. 659. Interest of vendor in land conveyed is subject to lien, see Tom's Creek etc. Co. v. Skeene (Ky.) 90 S. W. 993. See, also, Honaker v. Jones (Tex.) 113 S. W. 748. Lien extends only to portion of purchase price as to which reservation is made, see Shotwell v. McCardell (Tex.) 47 S. W. 39. May specify part covered: Brown v. Herring (Tex.) 101 S. W. 1023.

the same is not waived by his agreement to take lumber in payment for the note.[6]

§ 1233. Not waived by taking other security or pursuing remedy at law.—A lien thus expressly reserved differs also from the implied vendor's lien, in that it is not waived by taking other security. "A vendor's lien is the equitable right the vendor impliedly retains of subjecting the land sold to the payment of the purchase money. It need not arise from special agreement, but merely, and usually, from an implication of law, that the seller does not intend to release his claim on the land for the purchase money. But this lien may be released by an express or an implied agreement; and it has been held that it is lost by taking security for the price of the land sold, and it is held that it is personal, and is not transferable. Being secret, it is not so far favored as to be sustained in favor of an assignee of the debt, for the reason that equity does not presume that the assignee looks to the land for payment, which is presumed in favor of the vendor. In this case, however, the lien is expressly reserved in the deed and conceded in the notes. It arises by express contract, and became a matter of record, and full notice to all who might deal with the property, and being conceded in the notes, all persons purchasing them are assured by their contents that a lien is conceded, not only to the vendor, but to his assigns. This, then, is more than an ordinary vendor's lien. It is a written contract that the land shall be burthened with

[6] Harvey v. Kelly, 41 Miss. 490, 93 Am. Dec. 267. As the lien is a part of the deed, subsequent purchasers are as much bound by notice as they would be by a mortgage: Moore v. Lackey, 53 Miss. 85; Dingley v. Bank of Ventura, 57 Cal. 467; Stratton v. Gold, 40 Miss. 778; Sidwell v. Wheaton, 114 Ill. 267; Webster v. Mann, 52 Tex. 416; Carpenter v. Mitchell, 54 Ill. 126; Eichelberger v. Gitt, 104 Pa. St. 64; Patton v. Hoge, 22 Gratt. (Va.) 443; Peters v. Clements, 46 Tex. 114.

the lien until the notes are paid. If not a mortgage, it approximates one more nearly than an ordinary vendor's lien. It declares the land to be in pledge for the payment of the purchase money. It has the same effect as if a written agreement had been entered into and signed by the parties, that there should be a lien on the land to secure the payment of the notes, and that the assignee of the notes should have the right to enforce it. When the deed and notes are considered as a part of the same transaction, it is substantially the same as such an agreement, and it will be readily conceded that equity would carry an agreement thus entered into by the parties into effect, and enforce it as it would any other lawful contract. Here are parties competent to contract, the subject matter of a contract, and a sufficient consideration and an agreement legally entered into, and no reason is suggested why it should not be enforced." [7] Thus, the taking of additional security in the form of a trust deed for other lands does not affect the lien reserved by the deed.[8] Where the lien is expressly reserved in the contract, it is

[7] Carpenter v. Mitchell, 54 Ill. 126, 129, per Mr. Justice Walker, in delivering the opinion of the court. And see, also, Kent v. Williams, 114 Cal. 537, 46 Pac. 462; Warren v. Branch, 15 W. Va. 21, where title remains in vendor: Knisely v. Williams, 3 Gratt. 265, 46 Am. Dec. 193; Hatcher v. Hatcher, 1 Rand. 53; Lusk v. Hopper, 3 Bush, 179; Price v. Lauve, 49 Tex. 74; Sehorn v. McWhirter, 6 Baxt. (Tenn.) 313; Lewis v. Pusey, 8 Bush. 615; Fogg v. Rogers, 2 Cold. 290; Dunlap v. Shanklin, 10 W. Va. 662; Schwarz v. Stein, 29 Md. 112; Strickland v. Summerville, 55 Mo. 164; Whitehurst v. Yandall, 7 Baxt. (Tenn.) 228; Adams v. Cowherd, 30 Mo. 458; Hurley v. Hollyday, 35 Mo. 469; Magruder v. Peter, 11 Gill. & J. 217; Hines v. Perkins, 2 Heisk. 395; Bozeman v. Ivey, 49 Ala. 75; McCaslin v. State, 44 Ind. 151; Daniels v. Moses, 12 S. C. 130; Nixon v. Knollenberg Co. (Tex.) 37 S. W. 608.

[8] Price v. Lauve, 49 Tex. 74. The lien, however, may be waived by express language, or by acts showing a clear intent to waive it: Warren v. Branch, 15 W. Va. 21; Coles v. Withers, 33 Gratt. (Va.) 186; Byrns v. Woodward, 10 Lea (Tenn.), 444; Frazier v. Hendren, 80 Va. 265; French v. Dickey, 3 Tenn. Ch. 302.

not waived or impaired by pursuit of the remedy at law.[9] So, where the vendor brings an action on the purchase money notes, he does not lose the superior title acquired by his lien.[1]

§ 1234. **Lien reserved for benefit of another.**—It is not essential to the creation of this vendor's lien that it should be made for the exclusive benefit of the vendor, or for his benefit at all. Where it is so intended by the parties to the deed, a lien for the purchase money, payable to a stranger to the deed, may be retained for the latter's benefit, with his consent.[2]

§ 1235. **Grantee takes legal title.**—The grantee, of course, takes the legal title, but he takes it subject to the lien, in the same manner and to the same extent as if he had executed a mortgage. The title of the grantee may be levied upon and sold upon execution against him. The purchaser at the execution sale takes the title of the grantee subject to the lien, and an assignee of the note, given by the grantee, may enforce the lien against the execution purchaser.[3]

[9] Howard v. Herman (Tex.) 29 S. W. 542; Branch v. Taylor (Tex.) 89 S. W. 813; Kane v. Mann, 93 Va. 239, 24 S. E. 938; Fayette Land Co. v. R. Co., 93 Va. 274, 24 S. E. 1016.

[1] Rutherford v. Mothershed (Tex.) 92 S. W. 1021. See in this connection Bennett v. Murphy 108 N. Y. Supp. 231, 123 App. Div. 102. Where notes recite that they were given in payment of land and expressly retain a lien thereon, the deed and notes will be construed as one instrument evidencing an executory agreement to sell, although the deed itself does not expressly reserve a lien: New England etc. Trust Co. v. Willis, (Tex.) 47 S. W. 389. The vendee retains the right of possession as against a stranger: Mason v. Bender (Tex.) 97 S. W. 715. That Statute of Frauds does not cover agreement to release lien, see McKinley v. Wilson (Tex.) 96 S. W. 112. A deed reserving a lien to secure part payment of the purchase price is said to be an executory contract with the superior title in the vendor which can only be defeated by payment of the purchase money: Efron v. Burgower (Tex.) 57 S. W. 306.

[2] Mize v. Barnes, 78 Ky. 506.

[3] Chitwood v. Trimble, 58 Tenn.

§ 1236. Destruction of record.—When the deed reserving the vendor's lien is recorded, notice is given to all of its existence. Although a purchaser from the grantee may have paid the full amount of the purchase money without actual knowledge of the existence of the lien at the time payment was made, yet the due registration of the deed in which the lien was reserved, is constructive notice to him of such lien to the same extent as actual notice would have been. If the record of the deed has been destroyed, the notice given by registration is just as operative as if there had been no destruction of the record.[4]

§ 1237. No particular form required.—Any language which shows that the intention of the vendor was to reserve a lien is sufficient. Where a deed contains a description of the notes given for the purchase money, and in the *habendum* clause contains a recital, "to have and to hold on the payment of the notes hereinabove stated," the deed contains a sufficient reservation of a vendor's lien, and the recitals are sufficient to require a reasonable person to inquire whether the notes have been paid or not.[5] A statement that the land is conveyed "under and subject, neverthe-

(2 Baxt.) 78. The lien may be reserved by a separate instrument: Hobson v. Edwards, 57 Miss. 128; Carr v. Thompson, 67 Mo. 472; Helm v. Weaver, 69 Tex. 143; Eskridge v. McClure, 2 Yerg. (Tenn.) 84; Osborne v. Royer, 1 Lea (Tenn.) 217. The lien may secure the performance of a collateral agreement: Harvey v. Kelly, 41 Miss. 490, 93 Am. Dec. 267; Sidwell v. Wheaton, 114 Ill. 267. It is entitled to precedence over a prior judgment against the vendee: Parsons v. Hoyt, 24 Iowa, 154. Superior title remains in vendor: De Steaguer v. Pittman (Tex.) 117 S. W. 481.

[4] Armentrout's Executors v. Gibbons, 30 Gratt. 632. See, also, Moore v. Lackey, 53 Miss. 85; White v. Downs, 40 Tex. 225.

[5] Blaisdell v. Smith, 3 Bradw. (Ill.) 150. Allen, J., who delivered the opinion of the court, said: "It is insisted that defendants are not chargeable with notice of anything that may appear in the *'habendum'*; that it is no part of the deed; that the conveyance would be good without it. If it were true that what appears in the *habendum* they were

less, to the payment of" a certain sum of money at the time of decease of a widow to certain children, is sufficient to reserve a lien binding subsequent purchasers.[6] "There has been a manifest disposition in the courts to give a more liberal scope to the contracts of parties intended to create securities for the fulfillment of their obligations. An agreement to make a mortgage on land to secure a debt has, in equity, been construed to be a lien on the property, though the mortgage was never executed. Literally, it was but the personal engagement of the party. A security may be created on property, which is short of a grant, which does not vey or profess to convey the title, such as expressions in a conveyance that the vendor will look to the land as security for the money. No formula of words is necessary to create that right. Whatever words distinctly convey the idea that the vendor retains or reserves a lien on the land creates an express security. Such language does not create a technical mortgage, nor does it prevent the legal title from fully vesting in the purchaser; but this security follows the land, and being expressed in the deed, is notice, by reason of the regis-

not bound to notice, still we hold that the description of the note in the body of the deed, with the statement that it constituted part of the consideration, would be sufficient to charge them with notice under the authorities above cited. But the court is not aware of any rule or decision that requires the recital to appear in any particular part of the deed. The *habendum* clause is a part of the deed." No particular form required: Ford v. Ford (Tex.) 54 S. W. 773. See, also, Brown v. Pitts (Tex.) 37 S. W. 623. If the intent is clear, the form is immaterial: Portland etc. Co. v. Blodgett, 152 Fed. 929. See, also, Evans v. Ashe, 111 S. W. 965, 108 S. W. 398.

[6] Heist v. Baker, 49 Pa. St. 9. See Hutchinson v. Patrick, 22 Tex. 318. This lien is generally treated as a mortgage: Peters v. Clements, 46 Tex. 114; Robinson v. Woodson, 33 Ark. 307; Dingley v. Bank of Ventura, 57 Cal. 467; Stratton v. Gold, 40 Miss. 778; Carpenter v. Mitchell, 54 Ill. 126; Smith v. Rowland, 13 Kan. 245; Taliaferro v. Barnett, 37 Ark. 511; Adams v. Cowherd, 30 Mo. 458; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Hines v. Perkins, 2 Heisk. (Tenn.) 395; Webster v. Mann, 52 Tex. 416; Bozeman v. Ivey, 49 Ala. 75; Eich-

tration, to creditors and purchasers." [7] Where a deed conveys land "charged with the payment" of certain specified sums, the land is subject to the charge.[8] If the deed recites that the land is conveyed subject to the payment of the purchase money, a lien is created.[9] The fact that at the foot of such a deed there is a formal receipt for the purchase money, does not constitute even *prima facie* evidence of the satisfaction of the lien.[1] "If the purchasers," said Mr. Justice Trunkey, "had made inquiry of the proper parties, they could have learned whether the money was actually paid, and they stand in the vendor's shoes, holding the land as if they had bought with express notice of the amount remaining unpaid. The rule is, that whatever puts a party on inquiry amounts to notice, where the inquiry becomes a duty, as in the case of a purchaser of land, and would lead to a knowledge of the requisite fact by the exercise of ordinary diligence and understanding." [2] But where a vendee assumed a mortgage and gave his note for the full purchase price and afterwards had such note canceled to the amount of the mortgage, and gave his note for the amount to the mortgagee instead, it was held that, although the note recited that it was a purchase money note, it did not create a vendor's lien against the land.[3] And, likewise, notes purporting to be given by the former owner of real estate and reserving a vendor's lien thereon, which are forged, create no lien on the land.[4] The mere recital in a deed that part of the purchase money is evidenced by a note described therein, does not create a

elberger v. Gitt, 104 Pa. St. 64; Daniels v. Moses, 12 S. C. 130.

[7] Moore v. Lackey, 53 Miss. 85, 90, per Simrall, C. J. And see Carr v. Holbrooke, 1 Mo. 240; Pugh v. Holt, 27 Miss. 461.

[8] Stanhope v. Dodge, 52 Md. 483.

[9] Eichelberger v. Gitt, 104 Pa. 64.

[1] Eichelberger v. Gitt, 104 Pa. St. 64.

[2] In Eichelberger v. Gitt, *supra*. See, also, Berger v. Waldbaum, 93 N. Y. Supp. 352, 46 Misc. 4, aff'd in 96 N. Y. Supp. 1114, 110 App. Div. 115.

[3] Allen v. Newton (Tenn. Ch. App.) 48 S. W. 283.

[4] Neal v. Parker (Tenn. Ch. App.) 62 S. W. 170.

vendor's lien.[5] But the vendor's intention to reserve the superior title should be given effect where such intention may be gathered from the language used, though the lien is not expressly reserved.[6] A recital in a purchase price note as follows "secured by S. E. and S. W. quarter of N. E. block of out lot 70," is sufficient to constitute a reservation of an express lien on the property, the superior title remaining in the vendor until payment of the note.[7]

§ 1238. Unrecorded vendor's lien.—Where a vendor's lien is reserved in a separate instrument, it must be recorded in order to bind a subsequent *bona fide* purchaser for value without notice. And such a purchaser is not put upon inquiry by the fact that the parents of the grantor's wife are in possession under a recorded lease, which provides for the payment of only a nominal rent.[8] No additional lien is created by a recital in a note given for land that it "is to stand as a lien on said land until fully paid." [9]

§ 1239. Reservation of lien when not provided for in contract of sale.—When an owner of land agrees to sell it for a certain price, a portion of which is to be paid in cash at a future day, and notes are to be given by the vendee for the balance of the purchase money payable at a specified time, and it is agreed that, when these notes are given, the owner is to make to the vendee a deed with covenants of warranty, but the agreement is silent as to the reservation in the deed of the vendor's lien, or as to any security for the payment of the purchase money for which the notes are given, still, when the deed is executed, the vendor has a right to

[5] Proetzel v. Rabel (Tex.) 54 S. W. 373.

[6] Liscomb v. Fuqua (Tex.) 121 S. W. 193.

[7] Buckley v. Runge (Tex.) 122 S. W. 596.

[8] Moeller v. Holthaus, 12 Mo. App. 526.

[9] Waddell v. Carlock, 41 Ark. 523.

insert in it a clause by which a lien for the unpaid purchase money is reserved.[1]

§ 1240. **Verbal agreement cannot control lien.**—Where the grantor reserves in his deed a lien upon the land for the payment of the purchase price, the grantee cannot, in a suit brought to enforce such lien, set up as a defense that there was a contemporaneous verbal agreement that the grantor should not have the right to resort to the lien on the land for the land for the payment of the purchase money.[2]

§ 1241. **Estoppel of vendor.**—A vendor who has an express lien may by his acts estop himself from deriving any benefit from it. Where a grantor had retained an express lien for the purchase price of a piece of land, but after the grantee's death allowed the administrator of his estate to suggest the insolvency of the estate, and become a witness to show the title of his grantee to the land, the claim of the grantor being the principal debt against the grantee's estate, for the payment of which, as well as other debts proved and allowed, the land was ordered to be sold, and the grantor became a competing bidder at the sale of the land, it was held that he waived his lien by his conduct, and was estopped from enforcing any lien against the purchaser, but was compelled to look to the proceeds of the sale for the payment of his debt.[3] And a grantor may waive by parol a lien on lumber reserved in a conditional deed to secure the purchase price of the land.[4] So the lien holder may be estopped to assert the lien when he was present under mortgage foreclosure and

[1] Findley v. Armstrong, 23 W. Va. 113.

[2] Hutchinson v. Patrick, 22 Tex. 318. If the deed states that the land is subject to a specified indebtedness in favor of a creditor of the grantor, and that the grantee, as a part of the consideration, assumes its payment, the deed creates an express lien which the creditor of the grantor can enforce: Sidwell v. Wheaton, 114 Ill. 267.

[3] Butler v. Williams, 5 Heisk. 241.

[4] Stone v. Fairbanks, 53 Vt. 145.

stated that he had no claim upon the land.[5] But he is not estopped to assert his lien as against a purchaser of a part of the land where the proof fails to show that he had said anything from which it could be inferred that he would not assert such lien.[6]

§ 1242. **Vendor's lien and subsequent mortgage.**—A vendor's lien reserved in the deed is superior to all subsequent mortgage liens, and attaches to all structures subsequently becoming a part of the realty. Where a grantor reserves a lien, and a grantee builds a house on the land, and mortgages the house and land, the grantor has the superior lien, and may enforce it against both house and land.[7]

§ 1243. **Lien assignable.**—Where the vendor has not parted with the title, having executed only a contract of sale, or has executed a deed, but in it has reserved to himself a vendor's lien, the lien is assignable, and the assignee of the note given for the purchase money is entitled to the benefit of the security, and stands in the same position as the vendor.[8]

[5] Hoots v. Williams, 116 Ala. 372, 22 So. 497.

[6] Queen etc. Co. v. Hahn (Ky.) 53 S. W. 22.

[7] Louisville Building Assn. v. Korb, 79 Ky. 190. Is superior to interests acquired subsequently. See Flach v. Zanderson (Tex.) 91 S. W. 348; Colquitt v. Sturm (Tex.) 91 S. W. 872; Kalteyer v. Mitchell (Tex.) 110 S. W. 462. See also Watson v. Markham and Reese (Tex.) 77 S. W. 660 (mechanic's lien).

[8] Kimbrough v. Curtis, 50 Miss. 117; Sheppard v. Thomas, 26 Ark. 617; Walkenhorst v. Lewis, 24 Kan. 420; Wright v. Troutman, 81 Ill. 374; Stevens v. Chadwick, 10 Kan. 406, 15 Am. Rep. 348; Cleveland v. Martin, 2 Head, 128; Kelly v. Payne, 18 Ala. 371; Reynolds v. Morse, 52 Iowa, 155; Robinson v. Harbour, 42 Miss. 795, 97 Am. Dec. 501; Moore v. Anders, 14 Ark. 628, 60 Am. Dec. 551; Adams v. Cowherd, 30 Mo. 458; Terry v. George, 37 Miss. 539; Steinkemeyer v. Gillespie, 82 Ill. 253; Roper v. Day, 48 Ala. 509; Blaisdell v. Smith, 3 Bradw. (Ill.) 150; McClintic v. Wise, 25 Gratt. 418, 18 Am. Rep. 694; Campbell v. Rankin, 28 Ark. 401; Carpenter v. Mitchell, 54 Ill. 126; Dollahite v. Orne, 2 Smedes & M. 590; Tanner v Hicks, 4 Smedes & M. 294; Tharpe v. Dunlap, 4 Heisk. 674; Moore v. Lackey,

The lien is like an express mortgage, and the vendor has the same remedies as a mortgagor for its enforcement.[9] Where the party in possession and his vendor had nothing but a mere equity, and the party in possession acquired his rights with notice by the recitals of the deed, under which he claims that the purchase money has not been paid, it is not necessary to make such party in possession a party in the foreclosure proceedings.[1]

§ 1244. **Renewal of note.**—Where a note is given for the purchase money, and a lien is expressly retained in the deed to secure its payment, the note may afterward be renewed in favor of an assignee for principal and interest, and may bear interest at an increased rate, and have additional

53 Miss. 85; Wells v. Morrow, 38 Ala. 125; Roper v. McCook, 7 Ala. 318; Shall v. Biscoe, 18 Ark. 142; Rakestraw v. Hamilton, 14 Iowa, 157; Bills v. Mason, 42 Iowa, 329; Hall v. Click, 5 Ala. 363, 39 Am. Dec. 327; Rogers v. James, 33 Ark. 7; Martin v. O'Bannon, 35 Ark. 62; Wolffe v. Nall, 62 Ala. 24; Blair v. Marsh, 8 Iowa, 144; Hall v. Mobile etc. Ry. Co., 58 Ala. 10; Chitwood v. Trimble, 58 Tenn. 78. And see, also, Shinn v. Fredericks, 56 Ill. 439; Bailey v. Smock, 61 Mo. 213; Cummings v. Oglesby, 50 Miss. 153; Osborn v. Royer, 1 Lea (Tenn.) 217; Conner v. Banks, 18 Ala. 42, 52 Am. Dec. 209; Young v. Atkins, 4 Heisk. 529; Pitts v. Parker, 44 Miss. 247; Murray v. Able, 19 Tex. 213, 70 Am. Dec. 330; Skaggs v. Nelson, 25 Miss. 88; Parker v. Kelly, 10 Smedes & M. 184. See, also, Gordon v. Johnson, 186 Ill. 18, 57 N. E. 790; Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114; Powell v. Powell (Mo.) 117 S. W. 1113; Anderson v. Silliman, 92 Tex. 560, 50 S. W. 576; Atteberry v. Burnett (Tex.) 114 S. W. 159.

[9] Micou v. Ashurst, 55 Ala. 607; Gaston v. White, 46 Mo. 486; King v. Young Men's Ass'n., 1 Woods, 386. See Calvin v. Duncan, 12 Bush, 101; Johnston v. Cochrane, 84 N. C. 446.

[1] Robinson v. Black, 56 Tex. 215. Where several notes are given for the purchase price, the assignment of one carries with it so much of the lien as is necessary for its protection: Griggsby v. Hair, 25 Ala. 327; McClintic v. Wise, 25 Gratt. (Va.) 448, 18 Am. Rep. 694; Summers v. Kilgus, 14 Bush, 449; Menken vv. Taylor, 4 Lea (Tenn.) 445; Preston v. Ellengton, 74 Ala. 133. See, also, in this connection: Aycock etc. Co. v. First Nat. Bank, 54 Fla. 604, 45 So. 501.

signatures, and such new note will be secured by the vendor's lien reserved in the deed.[2] But the new note must have some connection with the original transaction by novation or otherwise.[3]

§ 1244a. **Extension of time of payment as against a subsequent purchaser.**—Although the land has been transferred to a subsequent purchaser, the lien may be enforced against the land, notwithstanding the original vendor has agreed with the original grantee for an extension of time of payment. The right to enforce the lien is not lost, even if the subsequent purchaser was not privy to the agreement for the extension of time, and notwithstanding the original vendee became insolvent before the expiration of the time for which payment had become extended.[4] If a vendor who has executed a deed, retaining a vendor's lien for unpaid installments of the purchase price, obtains a personal judgment against the vendee for nonpayment of one of the installments, and causes the land to be sold under execution to satisfy the judgment, he cannot enforce his vendor's lien against the vendee for a default in the payment of a later installment. The grantor waives his remedy in equity by electing to proceed at law, and the title acquired by the purchaser at the execution sale is freed from any further liability for the debt.[5] But where the vendor, instead of executing a deed, has given a bond for a deed upon the payment of the purchase money, the rule is different.[6] Where the land is sold under a de-

[2] Byrns v. Woodward, 10 Lea (Tenn.) 444. Wilcox v. First Nat'l Bank, 93 Tex. 322, 55 S. W. 317.

[3] French v. Dickey, 3 Tenn. Ch. 302. For a case where the giving of a note was held to create a novation, see Williams v. McCarty, 74 Ala. 295.

[4] Dalton v. Rainey, 75 Tex. 516, 13 S. W. Rep. 33.

[5] Dickason v. Eby, 73 Mo. 133; Outton v. Mitchell, 4 Bibb. 239; Lewis v. Chapman, 59 Mo. 371; Carter County Court v. Butler, 81 Ky. 597.

[6] Dickason v. Eby, 73 Mo. 133. See, also, Lewis v. Chapman, 59

cree for the enforcement of a vendor's lien, the sale releases the lien for the purchase money.[7] If a mortgage is not barred when the debt is, a lien reserved by contract may be enforced, although the statute of limitations has barred the debt.[8]

§ 1245. **Growing crops.**—As the lien of a mortgage attaches to the crops growing on the premises until severed from the soil, a vendor's lien created by express contract in the deed, being substantially a mortgage, has the same effect. If the land is sold for condition broken before the growing crops are severed, a purchaser is entitled to them as against the mortgagor, and all persons claiming under him.[9]

§ 1246. **Negotiable note not referred to in deed.**—In order that subsequent purchasers of a note given for the purchase money may enforce the vendor's lien reserved in the deed, the deed should refer to the note, so that all subsequent purchasers of the land may have notice that the note is in existence. A deed reserved a lien for the purchase money to be paid in five years, and the grantee executed a negotiable note for that amount, payable in five years, but the deed, while reserving a lien for the purchase money, did not refer to the note, or contain anything from which the existence of a note for that amount might be inferred. After the execution and delivery of the deed, the grantor indorsed and transferred the note to a bank in payment of an antecedent debt. After the transfer of the note, the grantor, to whom the note was payable, contracted to sell to a third party the land

Mo. 371; Broadwell v. Yantis, 10 Mo. 399; Lumley v. Robinson, 26 Mo. 364.

[7] Woods v. Ellis, 85 Va. 471, 7 S. E. Rep. 852.

[8] Waddell v. Carlock, 41 Ark. 523; Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; McPherson v. Johnson, 69 Tex. 484, 6 S. W. Rep. 798; White v. Blakemore, 8 Lea, 49; Driver v. Hudspeth, 16 Ala. 348; Paxton v. Rich, 85 Va. 378, 1 L.R.A. 639, 7 S. E. Rep. 531; Coldcleugh v. Johnson, 34 Ark. 312.

[9] Yates v. Smith, 11 Bradw. (Ill.) 459.

conveyed in his deed. The latter paid the purchase money and took from the original grantee a deed for the land. The second grantee was wholly ignorant of the existence of the negotiable note, and of any claim on the part of the bank to the purchase money due the original owner, and the court held that such second grantee took the property unaffected in favor of the bank holding the note.[1] "Other things being

[1] National Valley Bank of Staunton v. Harman, 75 Va. 604. Staples, J., in delivering the opinion of the court, said: "If the deed from M. G. Harman to Asher W. Harman had mentioned the existence of a negotiable note, it might have become the duty of Mrs. O'Toole before purchasing to call for its production; the failure of the parties to produce it might justly have led to a strong suspicion that the note had passed out of the possession of Michael G. Harman into the hands of a third party. Mrs. O'Toole having constructive notice of the lien, would have the like notice of the negotiable note, and she would not be allowed to close her eyes to the facts thus communicated. But it will be observed that the deed makes no reference to any note, or to any personal obligation of the debtor whatever. The most prudent and cautious inquirer would not have supposed that any such instrument existed. Certainly, it cannot be said that persons were bound at their peril to suspect or presume it. Indeed, a negotiable note payable five years after date is altogether so unusual that no one, even the most diligent, would have ever imagined that such a security formed a part of this transaction. I repeat, therefore, that upon the record, Asher W. Harman appeared as the owner of the land, subject only to the lien for the purchase money, and upon the record M. G. Harman appeared as the owner of the lien itself, without a circumstance of suspicion to put third persons upon inquiry. A deed from the former, with a relinquishment of the lien by the latter, would convey a perfect title according to every reasonable presumption and intendment. It has been said, however, that Mrs. O'Toole ought to have made inquiry. There was no person to whom she could have applied for information touching the lien, unless it was Michael G. Harman. But why apply to him when the transaction itself to which he was engaged was the strongest possible affirmation that he was entitled to the purchase money. The rule is that a purchaser will not be charged with notice by being put on inquiry, unless he has some more authentic means of information than can be found in an application to one who is interested in conceding the truth. In 2 Leading Cases in Equity, pages 49, 50, it is said: 'It cannot be required of a purchaser to inquire of the vendor, or of anyone who joins him in making title, whether he is com-

equal purchasers are favored both at law and in equity, above creditors, and so also the condition of the defendant is best. The chancellor prefers to allow a loss to rest where he finds

mitting a fraud or breach of trust by disposing of that which belongs to a third person or has been already sold. One who is engaged in a fraudulent design seldom hesitates at a falsehood. The law exacts nothing vain or useless. To make inquiry a duty, the circumstances must be such as will lead to knowledge': 2 Leading Cases in Equity, pt. 1, p. 50. A party will not be considered as having notice unless, the circumstances are such that the courts can say, not only that he could have acquired, but that he ought to have acquired the notice, but for his gross negligence in the conduct of the transaction in question. See, also, Siter, Price & Co. v. McClanachan, 2 Gratt. 313. According to these principles, Mrs. O'Toole cannot be charged with notice, actual or constructive. We cannot attribute to her either bad faith or negligence. In short, she is a purchaser for valuable consideration without notice. Against such a purchaser, courts of equity will not take the least step imaginable, and will, on the other hand, allow him to take every advantage which the law gives him, for there is nothing which can attach itself upon is conscience in such a case in favor of an adverse claim. . . . As both the title and the lien in this case appeared upon the record, I do not think any person could be safe in taking an assignment of the latter. The form and character of the transaction were such as placed it in the power of M. G. Harman, with the concurrence of Asher W. Harman to defraud the bank and to convey a good title to an innocent purchaser. As a matter of precaution, the bank might have indorsed the assignment and transfer of the debt on the registration of the deed. I do not mean to say that such an indorsement would constitute even constructive notice. With it, it is more than probable that Mrs. O'Toole would not have been involved in the purchase. At all events, the bank ought not to have dealt with such a security, unless it could have been placed in such a shape as would protect it as assignee, without injury to persons who might deal with the property without notice of any defect in the title. Upon such persons it cannot visit the consequences of its misplaced confidence. Nothing in my judgment could tend more to destroy confidence in titles, or more to impede the free transmission of property, than the successful assertion of secret encumbrances of this sort by strangers to the record." As to the protection afforded a purchaser against an unrecorded assignment of mortgagee, or a cancellation of mortgage with notes outstanding, see Henderson v. Pilgrim, 22 Tex. 464; Bowling v. Cook, 39 Iowa, 200; Bacon v. Van Schoonhoven, 19 Hun, 158; Turpin v. Ogle, 4 Bradw. (Ill.) 611; Smith v. Keohane, 6 Bradw. (Ill.) 585; Bank of the State of Indiana v.

it, rather than to transfer it to another equally entitled to his consideration; he prefers to allow rather than to inflict injustice, and to abstain from acting at all when all he can do is to shift a loss from one innocent person to another." [2]

§ 1247. **Comments.**—As the maker of a note is allowed to make payments to the payee unless he is notified that the note has been assigned, so a purchaser should be allowed to assume that all indebtedness for the payment of which a lien has been reserved has been discharged, when the vendor has satisfied and relinquished the lien, unless such purchaser has knowldge that some other person is entitled to have the lien kept alive for his benefit. To adopt a different rule would be to encourage those secret liens and equities which it is the policy of the law to limit and defeat.

§ 1248. **Effect of second deed.**—Where a grantor expressly reserves in his deed a lien for the purchase money, and subsequently executes a second deed to the same grantee in which he acknowledges the payment of the purchase price, when in fact it is not paid, the effect of the execution of the second deed is that the lien in the first deed, being a contract lien similar to a mortgage, is conveyed to the grantee, but under the second deed the grantor has the same equitable lien as if the first had never been executed.[3] In other words, the grantor occupies the same position as if nothing had been said in the first deed about a vendor's lien, but does not lose his implied lien for the payment of the purchase money.

Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Howard v. Ross, 5 Bradw. (Ill.) 456; Walker v. Schreiber, 47 Iowa, 529; Torrey v. Deavitt, 53 Vt. 331.

[2] Summers v. Kilgus, 14 Bush (64 Ky.) 449, 452, per Coffer, J.

[3] Robinson v. Woodson, 33 Ark. 307.

CHAPTER XXXV.

VENDOR'S IMPLIED LIEN.

§ 1249. Vendor's lien.
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1269. Subsequent purchasers.
1270. Notice.
1271. Unrecorded deed.
1272. Enforcement of lien.

§ 1249. Vendor's implied lien.—The implied lien of the vendor for the unpaid purchase money, although frequently criticised, is generally recognized as a just and proper rule.[1] "Under our law, where so much strictness is required

[1] Blackburn v. Gregson, 1 Bro. Ch. 240; Chapman v. Tanner, 1 Vern. 267; Thornton v. Knox, 6 Mon. B. 74; Tiernan v. Thurman, 14 Mon. B. 277; Ledford v. Smith, 6 Bush, 129; Emison v. Risque, 9 Bush, 24; McDole v. Purdy, 23 Iowa, 277; Jordan v. Wimer, 45 Iowa, 65; Grapengether v. Fejervary, 9 Iowa, 163, 74 Am. Dec. 336; Johnson v. McGrew, 42 Iowa, 555; Boynton v. Champlain, 42 Ill. 57; Wilson v. Lyon, 51 Ill. 166; Moshier v. Meek, 80 Ill. 79; Gallagher v. Mars, 50 Cal. 23; Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Burt v. Wilson, 28 Cal. 632; 8 7Am. Dec. 142; Sparks v. Hess, 15 Cal. 186; Shall v. Biscoe, 18 Ark. 142; Refeld v. Ferrell, 27 Ark.

with regard to placing on the appropriate records evidences of liens and encumbrances, it would seem that in the absence of fraud, courts should be careful in the recognition of this

534; Keith v. Horner, 32 Ill. 524; Dyer v. Martin, 4 Scam. 146; Willard v. Reas, 26 Wis. 540; Pitts v. Parker, 44 Miss. 247; Wing v. Goodman, 75 Ill. 159; Kirkham v. Boston, 67 Ill. 599; Campbell v. Rankin, 28 Ark. 401; Lavender v. Abbott, 30 Ark. 172; Turner v. Horner, 29 Ark. 440; Gordon v. Bell, 50 Ala. 213; Wood v. Sullens, 44 Ala. 686; Ross v. Whitson, 6 Yerg. 50; Pinchain v. Collard, 13 Tex. 333; White v. Stover, 10 Ala. 441; Burns v. Taylor, 23 Ala. 255; Bradford v. Harper, 25 Ala. 337; Brown v. Christie, 35 Tex. 689; White v. Downs, 40 Tex. 225; Flanagan v. Cushman, 48 Tex. 241; Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44; Dodge v. Evans, 43 Miss. 570; Richardson v. Bowman, 40 Miss. 782; Hoskins v. Rowe, 61 Iowa, 180; Francis v. Wells, 2 Colo. 660; Pratt v. Clark, 57 Mo. 189; Carr v. Hobbs, 11 Md. 285; Smith v. Smith, 9 Abb. Pr. N. S., 420; Chase v. Peck, 21 N. Y. 581; Selby v. Stanley, 4 Minn. 65; Marsh v. Turner, 4 Mo. 253; Delassus v. Poston, 19 Mo. 425; Mattix v. Weand, 19 Ind. 151; Deibler v. Barwick, 4 Blackf. 339; Yaryan v. Shriner, 26 Ind. 364; Ross v. Adams, 13 Bush, 370; Carroll v. Van Rensselaer, Har. (Mich.) 225; Payne v. Avery, 21 Mich. 524; Duke v. Balme, 16 Minn. 306; Corlies v. Howland, 26 N. J. Eq. 311; Dudley v. Dickson, 14 N. J. Eq. 252; Herbert v. Scofield, 1 Stockt. Ch. 492; Stafford v. Van Rensselaer, 9 Cowen, 316; Chase v. Peck, 21 N. Y. 581; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Williams v. Roberts, 5 Ohio, 35; Brush v. Kinsley, 14 Ohio, 20; Pease v. Kelly, 3 Or. 417; Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; Ford v. Smith, 1 McAr. 592; Wooten v. Bellinger, 17 Fla. 289; Ransom v. Brown, 63 Tex. 188; Bradford v. Marvin, 2 Fla. 463; Blackburne v. Gregson, 1 Cox, 90; 1 Bro. Ch. 420; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Mackreth v. Symmons, 15 Ves. 329; Hill v. Grigsby, 32 Cal. 55; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Kelly v. Karsner, 81 Ala. 500; Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57; Crampton v. Prince, 83 Ala. 246, 3 Am. St. Rep. 718; Betts v. Sykes, 82 Ala. 378; Burton v. Henry, 90 Ala. 281; Jackson v. Stanley, 87 Ala. 270; Jones v. Lockard, 89 Ala. 575; Weaver v. Brown, 87 Ala. 533; Cordova Coal Co. v. Long, 91 Ala. 538; Strong v. Strong, 126 Ill. 301; Gruhn v. Richardson, 128 Ill. 178; Scheffer v. Adams, 13 Colo. 582; Erickson v. Smith, 79 Iowa, 374; Gessner v. Palmateer, 89 Cal. 89; Bancroft v. Cosby, 74 Cal. 583; Fitzell v. Leaky, 72 Cal. 477; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Springfield etc. R. R. Co. v. Stewart, 51 Ark. 285; Chapman v. Chapman, 55 Ark. 542; Otis v. Gregory, 111 Ind. 504; Hawes v. Chaille, 129 Ind. 435; Strohm v. Good, 113

lien. And yet there is much of good conscience, equity, and natural justice, in providing that the vendor shall not be regarded as having lost all dominion over his property until

Ind. 93; Yettey v. Fitts, 113 Ind. 34; Nysewander v. Lowman, 124 Ind. 584; Brower v. Witmeyer, 121 Ind. 83; Baltimore etc. Turnpike Co. v. Moale, 71 Md. 353; Walsh v. McBride, 72 Md. 45; Acton v. Waddington, 46 N. J. Eq. 16; Balow v. Farmers' Mut. F. Ins. Co., 77 Mich. 540; Donovan v. Donovan, 85 Mich. 63; Dunton v. Outhouse, 64 Mich. 419; Waterfield v. Wilber, 64 Mich. 642; Richards v. Shingle etc. Co., 74 Mich. 57; Wisconsin Marine etc. Bank v. Filer, 83 Mich. 496; Strong v. Ehle, 86 Mich. 42; Christy v. McKee, 94 Mo. 241; Melcher v. Derkum, 44 Mo. App. 650; First Nat. Bank v. Salem Capital Flour Mills Co., 39 Fed. Rep. 89; Gee v. McMillan, 14 Or. 268, 58 Am. Rep. 315; Peters v. Tunnell, 43 Minn. 473, 19 Am. St. Rep. 252; Law v. Butler, 44 Minn. 482, 9 L.R.A. 856; Bell v. Blair, 65 Miss. 191; Seymour v. McKinstry, 106 N. Y. 230; Evans v. Enloe, 70 Wis. 345; Cate v. Cate, 87 Tenn. 41; Hamblen v. Folts, 70 Tex. 136; Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17; Johnson v. Townsend, 77 Tex. 639; Wright v. Campbell, 82 Tex. 388; McMichael v. Jarvis, 78 Tex. 671; McCamly v. Waterhouse, 80 Tex. 340; Hood v. Hammond, 128 Ala. 569; Walton v. Young, 132 Ala. 150; Lee v. Murphy, 119 Cal. 364; Schiffer v. Adams, 13 Colo. 572; Marvin v. Stimpson, 23 Colo. 174; Pleasants v. Fay, 13 App. Cas. (D. C.) 237; Blomstrom v. Dux, 175 Ill. 435; Lewis v. Shearer, 189 Ill. 184; Scott v. Edgar, 159 Ind. 38; Ballard v. Camplin, 161 Ind. 16; Hampton v. Mayes, 3 Indian Ter. 65; Shrimsher v. Newton, 3 Indian Ter. 555; Maryland Land etc. Assoc. v. Moore, 80 Md. 102; Hooper v. Central Trust Co., 81 Md. 559, 29 L.R.A. 262; Kulling v. Kulling, 124 Mich. 56; Warner v. Bliven, 127 Mich. 665; Bang v. Brett, 62 Minn. 4; Harvey v. Kelly, 41 Miss. 490; Maynard v. Cocke, 71 Miss. 493; Jones v. Rush, 156 Mo. 364; Morgan v. Dalrymple, 59 N. J. Eq. 22; Harter v. Capital City Brewing Co., 64 N. J. Eq. 155; Hubbell v. Henrickson, 175 N. Y. 175; Bach v. Kidansky, 106 N. Y. App. Div. 502; Roby v. Bismark Nat. Bank, 4 N. Dak. 156; Bray v. Booker, 6 N. Dak. 526; Miller v. Albright, 60 Ohio St. 48; Coggshall v. Marine Bank Co., 63 Ohio St. 88; Craggs v. Earls, 8 Okla. 462; Richardson v. Fellner, 9 Okla. 513; Reynolds v. Hennessy, 17 R. I. 169; Poindexter v. Rawlings, 106 Tenn. 97; Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123; Lyon v. Clark, 132 Mich. 521, 94 N. W. 4, 10 Detroit Leg. N. 13; Smith Granite Co. v. Newall, 22 R. I. 220, 47 Atl. 97; Wagner v. Brinkerhoff, 123 Ala. 516, 26 So. 117; Croft v. Perkins, 174 Ill. 627, 51 N. E. 816; Brown v. White, 32 Ind. App. 100, 67 N. E. 273; Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689; White v. Taylor, 107 Ky. 20, 21 Ky. Law Rep. 602, 52 S. W. 820; Halvorsen v. Halvorsen,

he is paid the agreed price. This lien or trust, though formerly objected to as being in contravention of the policy of the statute of frauds, and for other reasons, is now firmly established. Its necessity is, indeed, too apparent, the beneficial consequences too clear, and its equitable existence too well sustained, to need now either authority or reason to prove its origin or design."[2] But "these equitable liens on real estate are generally unknown to the world, and frequently operate injuriously on the rights of creditors and purchasers, and ought not to be enforced but in cases where the right is clearly and distinctly made out."[3] In many States, this rule of the vendor's implied lien never existed, or has been abolished by statute.[4]

120 Wis. 52, 97 N. W. 494. In Kentucky, a vendor's implied lien does not prevail against *bona fide* purchasers and creditors of the vendee unless the deed states what part of the purchase price remains unpaid. But as between the vendor and vendee the lien exists, regardless as to whether the amount of the unpaid part of the purchase price is stated in the deed: Ashbrook v. Roberts, 82 Ky. 298; Brown v. Ferrell, 83 Ky. 417. The rule in the United States courts is to recognize the lien when such is the law of the State in which the land is situated; Fisher v. Schropshire, 147 U. S. 133, 37 L. ed. 109; Slide, etc. Gold Mines v. Seymour, 153 U. S. 509, 38 L. ed. 802.

[2] Pierson v. David, 1 Iowa (Clarke), 23, 27, per Mr. Chief Justice Wright. And see Porter v. City of Dubuque, 20 Iowa, 440, and Minah Consol. Min. Co. v. Briscoe, 32 C. C. A. 390, 89 Fed. 891.

[3] Conover v. Warren, 1 Gilm. 498, 502, per Treat, J.; 41 Am. Dec. 196.

[4] Simpson v. Mundee, 3 Kan. 172; Smith v. Rowland, 13 Kan. 245; Brown v. Simpson, 4 Kan. 76; Greeno v. Barnard, 18 Kan. 518; Kauffelt v. Bower, 7 Serg. & R. 64, 10 Am. Dec. 428; Stephen's Appeal, 38 Pa. St. 9; Hepburn v. Snyder, 3 Pa. St. 72; Heister v. Green, 48 Pa. St. 96, 86 Am. Dec. 569; Philbrook v. Delano, 29 Me. 410; Gilman v. Brown, 1 Mason, 191; Henderson v. Burton, 3 Ired. Eq. 259; Cameron v. Mason, 7 Ired. Eq. 180; Womble v. Battle, 3 Ired. Eq. 182; Jones v. Janes, 56 Ga. 325; Chapman v. Beardsley, 31 Conn. 115; Atwood v. Vincent, 17 Conn. 575; Watson v. Wells, 5 Conn. 468; Meigs v. Dimock, 6 Conn. 458; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; Edminster v. Higgins, 6 Neb. 265; Warren v. Branch, 15 W. Va. 21. And see, Code Georgia, 1873, § 1997; Virginia, 1873, ch. 115, § 1; Vermont

§ 1250. **Independent of agreement.**—The vendor's lien spoken of in this chapter is not dependent upon the agreement of the parties, but is an equitable right implied by law. Its enforcement is not prevented by a verbal agreement by the grantee to reconvey the land to the grantor in case of a failure to pay the purchase price. Such an agreement is void under the statute of frauds.[5] "The lien exists, although there be no special agreement for that purpose, and notwithstanding the vendor conveys the land by deed, and takes the note or bond of the vendee for the purchase money. To the extent of the lien the vendee becomes a trustee for the vendor, and his heirs, etc., and all other persons claiming under him,

Stats., 1851, ch. 47; Gen. Stats. 1862, ch. 65, § 33; Gen. Stat. Vt. 1862, ch. 65, p. 33; Code West Va. (1900) ch. 75, § 1, par. 698; Arlin v. Brown, 44 N. H. 102; 1 Jones on Mort., § 191; Chilton v. Braiden, 2 Black, 458, 17 L. ed. 304; Bayley v. Greenleaf, 7 Wheat. 46, 5 L. ed. 393; McLearn v. McLellan, 10 Pet. 625, 9 L. ed. 559. See Kelly v. Ruble, 11 Or. 75. In the Federal courts, the rule is recognized when it prevails in the State where the land affected is situated: Cardova v. Hood, 17 Wall. 1, 21 L. ed. 587; Chilton v. Braiden, 2 Black, 458, 17 L. ed. 304; Bayley v. Greenleaf, 7 Wheat. 46, 5 L. ed. 393; Coos Bay Wagon Road Co. v. Crocker, 6 Sawy. 574; First Nat. Bank v. Salem Capital Flour Mills Co., 39 Fed. Rep. 89. The vendor's ignorance that the law gives him a lien or his secret intention not to claim a lien does not defeat his lien: Marshall v. Marshall, 42 S. W. 353. It is not essential to the right to enforce the lien that it appear that the vendor has retained the lien through some affirmative act: Wendell v. Pinneo, 127 Ill. App. 319. The act of the vendor indicating that he does not rely upon the lien in order to defeat the lien must be one substantially inconsistent with the continued existence of the lien: Finnell v. Finnell, 156 Cal. 589; 105 Pac. 740; Godwin v. Collins, 3 Del. Ch. 189; Peck v. Culberson, 104 N. Car. 426; Draper v. Allen, 114 N. Car. 50; Quinnerly v. Quinnerly, 114 N. Car. 145; Frame v. Sliter, 29 Oregon, 121, 34 L.R.A. 690; Wragg v. Comptroller-Gen., 2 Desaus. (S. Car.) 520; Haslam v. Haslam, 19 Utah, 1; Schenck v. Wicks, 23 Utah, 576; Wilson v. Morrell, 5 Wash. 654; Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 63 S. E. 1045; In re Clark, 118 Fed. 358; Baker v. Fleming, 6 Ariz. 418, 59 Pac. 101; Smith v. Allen, 18 Wash. 1, 39 L.R.A. 82, 63 Am. St. Rep. 864, 50 Pac. 783; Scraggs v. Hill, 43 W. Va. 162, 27 S. E. 310.

[5] Gallagher v. Mars, 50 Cal. 23. See Bennett v. Shipley, 82 Mo. 448.

with such notice, are treated as in the same predicament. The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it, and not pay the full consideration money. And third persons having full knowledge that the estate has been so obtained, ought not to be permitted to keep it, without making such payment, for it attaches to them, also, as a matter of conscience and duty. It would otherwise happen that the vendee might put another person in a predicament better than his own, with full notice of all the facts." [6]

[6] Shall v. Biscoe, 18 Ark. 142, 157, per Mr. Chief Justice English. For various cases concerning vendor's liens, generally, see, Hawk v. Leverett, 71 Ga. 675; Lomis v. Davenport & St. Paul R. R. Co., 3 McCrary C. C. 489, 17 Fed. Rep. 301; Nutter v. Fouch, 86 Ind. 451; Cross v. Burlington & Southwestern Ry. Co., 58 Iowa, 62; Butterfield v. Okie, 36 N. J. Eq. 482; Wooters v. Hollingsworth, 58 Tex. 371; Louisville Building Assn. v. Korb, 79 Ky. 190; Clay's Succession, 34 La. Ann. 1131; Byrns v. Woodward, 10 Lea (Tenn.) 444; Murray v. Witte, 16 S. C. 504; Wright v. Heffner, 27 Tex. 518; Bergeron v. Pattin, 34 La. Ann. 534; McCarty v. Williams, 69 Ala. 174; Lewis v. Cranmer, 36 N. J. Eq. 124; Ware v. Curry, 67 Ala. 274; Kingsbury v. Milner, 69 Ala. 502; Evans v. Feeny, 81 Ind. 532; Fleece v. O'Rear, 83 Ind. 200; Brown v. Barrett, 75 Mo. 275; Exchange & Deposit Bank v. Stone, 80 Ky. 109; Young v. Harris, 36 Ark. 162; Crocker, 6 Sawy. 574; Glaze v. Coos Bay Wagon Road Co. v. Watson, 55 Tex. 563; White v. Blakemore, 8 Lea (Tenn.), 49; Jones v. Lagland, 4 Lea (Tenn.), 539; Bowman v. Faw, 5 Lea (Tenn.), 472; Hume v. Dixon, 37 Ohio St. 66; Marchand v. Frellsen, 105 U. S. 423, 26 L. ed. 1057; Menken v. Taylor, 4 Lea (Tenn.), 445; Stone v. Fairbanks, 53 Vt. 145; Dickason v. Eby, 73 Mo. 133; Rogers v. Blum, 56 Tex. 1; Jarman v. Farley, 7 Lea (Tenn.), 141; Sharp v. Fly, 9 Baxt. 4; Ross v. Swan, 7 Lea (Tenn.), 463; Berry v. Ginaca, 6 Sawy. 390; Wynn v. Rosette, 66 Ala. 517; Dugge v. Stumpe, 73 Mo. 513; Robinson v. Black, 56 Tex. 215; Carey v. Boyle, 53 Wis. 574; Thomas v. Bridges, 73 Mo. 530; Dance v. Dance, 56 Md. 433; Alabama v. Stanton, 5 Lea (Tenn.), 423; National Valley Bank v. Harman, 75 Va. 604; Chandler v. Chandler, 78 Ind. 417; Cassaday v. Frankland, 55 Tex. 452; Vail v. Drexel, 9 Ill. App. 439; Whitten v. Saunders, 75 Va.

§ 1250a. **Creature of equity.**—It is a creature of equity and until established by a decree of court it does not really exist,[7] and it is based on the principle that in justice a person who obtains the title to land from another should not be allowed to retain it when he fails to pay the consideration.[8] It does not depend upon the agreement of the parties but is an equitable security,[9] which the law gives to the grantor where he has not taken any other lien or security for the payment of the consideration,[1] in the nature of a mortgage, but the amount must be certain.[2] The lien cannot exist unless the land is sold for a consideration payable positively and not contingently as the debt must be created at the same time as the sale.[3] The lien cannot be said to be an estate but it is, more clearly speaking, a mere right, having a potential and not a tangible existence as an incident to the obligation for the payment of the purchase price, and when no such obligation exists, there is no such lien.[4] Equity recognizes it as a right for the purpose of protecting the general equity that the purchaser shall not hold the property free from his agreement to pay

563; Edmonson v. Phillips, 73 Mo. 57; Gaston v. Dashiell, 55 Tex. 508; Rowell v. Williams, 54 Wis. 636; Mueller v. Brigham, 53 Wis. 173; Robbins v. Magee, 76 Ind. 381. The vendor does not loose his lien by remaining in possession of the property: Johnson v. McKinnon, 45 Fla. 388, 34 So. 272. See, also, Morgan v. Dalrymple, 60 N. J. Eq. 466, 46 Atl. 666. It was held in Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243, that a vendor who has not executed a deed has a lien on the vendee's equitable estate as security for the payment of the purchase price and holds the legal title in trust for the purchaser.

[7] Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114.

[8] Minah Consol. Co. v. Briscoe, 32 C. C. A. 390, 89 Fed. 891.

[9] Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591; McKeown v. Collins, 38 Fla. 276, 21 So. 103.

[1] Rewis v. Williamson, 51 Fla. 529, 41 So. 449. See, also, Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229; Nutter v. Fouch, 86 Ind. 451.

[2] Balow v. Teutonia Farmers' Mut. Fire Ins. Co., 77 Mich. 540, 43 N. W. 924.

[3] Palmer v. Sterling, 41 Mich. 218, 2 N. W. 24. See, also, Weare v. Linnell, 29 Mich. 224.

[4] Marchand v. Chicago B. & Q. R. Co., 127 S. W. 387.

for it, but it is neither a legal lien nor an interest in the property itself.[5] It is not created by any agreement or intention of the parties but is an equity recognized and enforced by a court of chancery for the benefit of the grantor.[6]

§ 1251. Receipt for consideration.—Although the grantor may acknowledge in the deed the receipt of the purchase money, such acknowledgment does not preclude him from enforcing the lien, when in fact it has not been paid.[7] The recital of the payment of the consideration must be overcome by evidence. But though the evidence adduced for that purpose may be slight, yet if it was sufficient to satisfy the jury, an appellate court will not disturb the judgment.[8]

[5] Larscheid v. Hashek Mfg. Co., 142 Wis. 172, 125 N. W. 442.

[6] Royal Consol. Min. Co. v. Royal Consol. Mines Co., 110 Pac. 123. A vendor has a lien where he delivers possession of the property to the grantee on his promise to make such payments as he could: Hubbell v. Henrickson, 175 N. Y. 175, 67 N. E. 302, reversing 76 N. Y. S. 1016, 73 App. Div. 620. As the lien is based on an implied agreement it must appear from the circumstances of the sale, that it was the intention of the parties that the sale was made and credit given on reliance on the lien: Richards v. Lewis etc. Co., 74 Mich. 57, 41 N. W. 860. Although the vendor may remain in possession of the land, yet he may be entitled in equity to a lien as such a lien is not dependent on possession: Johnson v. McKinnon, 45 Fla. 388, 34 So. 272. Where a note is given in consideration of a devise it is substantially a purchase-money note and a lien may be enforced against the property: Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505. Although the vendor has executed a deed in which the receipt of the purchase money is admitted, yet a lien exists, if in fact, the consideration price was not paid, binding the grantee and all purchasers with notice: Dunton v. Outhouse, 64 Mich. 419, 31 N. W. 411; Cecil v. Henry, 93 S. W. 216; Blevins v. Blankenship, 9 Ky. Law Rep. 715, 7 S. W. 175; Wagner v. Brinkerhoff, 123 Ala. 516, 26 So 117; Halvorsen v. Halvorsen, 120 Wis. 52, 97 N. W. 494.

[7] Holman v. Patterson, 29 Ark. 357; Tribble v. Oldham, 5 Marsh. J. J. 137; Mackreth v. Symmons, 15 Ves. 329; Sheratz v. Nicodemus, 7 Yerg. 9; Cuney v. Bell, 34 Tex. 177; Scott v. Orbison, 21 Ark. 202; Gilman v. Brown, 1 Mason, 191; Gordon v. Manning, 44 Miss. 756; Cecil v. Henry, 93 S. W. 216; Marshall v. Marshall, 42 S. W. 353; Springman v. Hawkins, 113 S. W. 966.

[8] Cuney's Executors v. Bell, 34

§ 1252. **Payment by another.**—The vendor's lien is one that exist in his favor. If a person advance money to the vendee to make payments on the land purchased, or if at the vendee's request he pays the amount due to the vendor, who thereupon executes a deed to the purchaser, the person making this advance has not a vendor's lien upon the land.[9] But a third person, to whom the grantee, at the grantor's request, has agreed to pay a part of the purchase price, may enforce the lien.[1] Thus, where the purchaser assumes, as a part of the purchase price, the payment of a sum due by a vendor to another, the latter can claim a vendor's lien.[2]

§ 1253. **Homestead.**—Although the land is subject to a vendor's lien, this does not prevent the creation of a homestead, but the homestead is subordinate to the lien. After the

Tex. 177. Attorney's fees may be collected in a suit to enforce the lien when the note contains a clause obligating the vendee to pay the attorney's fees in case suit is brought on the note: Neese v. Riley, 77 Tex. 348; Johnson v. Durner, 88 Ala. 580.

[9] Chapman v. Abrahams, 61 Ala. 108; Gray v. Baird, 4 Lea (Tenn.), 212. See Preston v. McMillan, 58 A Ala. 84; Tilford v. Torrey, 53 Ala. 120; Hardin v. Hooks, 72 Ark. 433, 81 S. W. 386. Where A without any authority buys land for and takes a deed in the name of B giving his own note for the puhchase money, the only delivery of the deed being to A and B in no way ratifying the act, there is no vendor's lien created as there is not a completed sale; Jones v. Laird, 42 So. 26. See as to the vendor's reserved lien, § 1234, *ante*.

[1] Latham v. Staples, 46 Ala. 462; Francis v. Wells, 2 Colo. 660; Thompson v. Thompson, 3 Lea (Tenn.), 126; Mitchell v. Butt, 45 Ga. 162; Campbell v. Roach, 45 Ala. 667. See Mize v. Barnes, 78 Ky. 506; Knox v. McCain, 13 Lea (Tenn.), 197.

[2] De L'Isle v. Moss, 34 La. Ann. 164; Carver v. Eads, 65 Ala. 190. Where a party paid for certain real estate for the use of a church as a parsonage and dwelling for the priest of such church, under an agreement that he was to have a lien on such property and an equitable title to it, until he was repaid, and where the deed was made according to the policy of the church to the bishop who was a mere volunteer, paying nothing therefor, it was held that the person furnishing the money had a lien against the real estate in the hands of the bishop: Dwenger v. Branigan, 95 Ind. 221; West Plains Bank v. Edwards, 84 Mo. App. 462.

homestead has been created it requires the wife's assent to charge the land by an agreement to pay interest in addition to the consideration price. The husband alone cannot do this.[3] Where, for the purpose of preventing the enforcement of a vendor's lien against a party's homestead, another lent him money to pay off the lien, taking a mortgage on the property for the amount advanced, and subsequently, on the cancellation of this mortgage, taking a new note for the amount due with interest, with the recital that it was for the purchase money of the homestead, the court held that there was a lien in his favor.[4]

§ 1254. Presumption of lien.—Unless it is evident that the vendor has waived the lien, it is presumed to exist.[5] And it may be enforced against the heirs of the grantee.[6] If a grantor take other property, the title being covenanted by the grantee, the lien is waived when it is apparent that the grantor has shown his intention to rely upon that protection.[7] The lien covers the right of the widow to dower in the land.[8] The lien is confined to the amount due on the sale, and will not

[3] McHendry v. Reilly, 13 Cal. 75. See, also, Williams v. Young, 17 Cal. 403; Bradley v. Curtis, 79 Ky. 327; Berry v. Boggess, 62 Tex. 239; Claybrooks v. Kelly, 67 Tex. 634.

[4] Hicks v. Morris, 57 Tex. 658.

[5] Wilson v. Lyon, 51 Ill. 166; Allen v. Bennett, 8 Smedes & M. 672; Dodge v. Evans, 43 Miss. 570; Truebody v. Jacobson, 2 Cal. 269; Gilman v. Brown, 1 Mason, 191; Fry v. Prewett, 56 Miss. 783; Garson v. Green, 1 Johns. Ch. 308; Schnebly v. Ragan, 7 Gill & J. 120, 28 Am. Dec. 195; Clark v. Hall, 7 Paige, 382; Bennett v. Shipley, 82 Mo. 448; Coos Bay Wagon Road Co. v. Crocker, 6 Sawy. 574; Stringfellow v. Ivie, 73 Ala. 213; Carver v. Eads, 65 Ala. 190; Wilkinson v. May, 69 Ala. 33; Joiner v. Perkins, 59 Tex. 300. Where the vendor has necessarily expended money for improvements, which the vendee under the contract of sale should have made, the amount expended may be considered as unpaid purchase money for which a lien exists: Grove v. Miles, 71 Ill. 376.

[6] Shirley v. Sugar Refinery, 2 Edw. Ch. 505; Bayley v. Greenleaf, 7 Wheat. 46; Warner v. Van Alstyne, 3 Paige, 513.

[7] Hare v. Van Deusen, 32 Barb. 92; Coit v. Fougera, 36 Barb. 195.

[8] Boyd v. Martin, 9 Heisk, 382; Fisher v. Johnson, 5 Ind. 492.

secure any indebtedness due for other causes.[9] The vendor is entitled to the lien when only a mere equitable interest is sold.[1] If the vendor induces a person to purchase the property as unencumbered, by representing that the lien no longer exists, or would not be insisted upon, he may be estopped from claiming the lien.[2] The vendor is not entitled by virtue of his lien to claim any of the profits of the land.[3]

§ 1255. **Tenants in common.**—The party to whom an amount of money is allowed as owelty in partition, has an equitable lien in the nature of a vendor's lien. "That the sum awarded in partition for inequality between the smaller and larger divisions is a lien upon the larger division, we are well satisfied. The final decree operates as a conveyance, and transfers in severalty what was held in common. If the division is unequal in value, this inequality is compensated by the allotment of a sum of money sufficient to equalize the respective divisions. In other words, where one party gets more of the land than his cotenant, he is required to pay for the excess, because the land to that extent which has been allotted to him, is in fact and in the eye of the law the land of his cotenant. It forms the consideration for whch the payment is to be made, and in getting the land of another for a money consideration, it must be that he is to be considered a purchaser." [4] Where one tenant in common sells to another tenant in common an undivided interest in the lands held by them, a lien on the interest sold, for the unpaid purchase money, arises in favor

[9] Refeld v. Ferrell, 30 Ark. 465.

[1] Logwood v. Robertson, 62 Ala. 523; Warren v. Fenn, 28 Barb. 333.

[2] Thompson v. Dawson, 3 Head, 384; Reilly v. Miami Exporting Co., 5 Ohio, 333; Henson v. Westcott, 82 Ill. 224; Burns v. Taylor, 23 Ala. 255; Atkinson v. Lindsey, 39 Ind. 296.

[3] Little v. Brown, 2 Leigh, 353; Hall v. Scovell, 10 Nat. Bank Reg. 295.

[4] Baltimore & Ohio R. R. Co. v. Trimble, 51 Md. 99, 107.

of the vendor.[5] One partner selling land to another partner is entitled to a vendor's lien.[6]

§ 1256. **Uncertain claim.**—The vendor cannot claim a lien as security for an uncertain demand.[6a] A having agreed to sell to B the undivided half of a tract of land at a specified price, and B at the same time having agreed to render his personal services in the management and sale of the land, A executed a deed to B in compliance with the contract, taking back a mortgage as security for its performance. B failed to perform his part of the contract, and A claimed an equitable lien upon the land for the value of the services which were not performed as required by the contract, and also for the amount of a deduction which had been made from the real value of the interest sold to B, as a special inducement to enter into the contract. The court held that while A might be able to maintain a remedy at law for damages caused by B's failure to comply with his contract, such damages were too uncertain in their character to form the subject of a vendor's lien.[7] "The rule which appears to be settled by the authorities is, that in order to create such a lien, there must be a debt for unpaid purchase money to a fixed amount due directly to the vendor. If the obligation consist of a collateral covenant, or be for the discharge of a liability to a third party, no lien is retained when the conveyance is absolute; and where the obligation of the vendee to discharge such liability appears to be substituted for the purchase money, the lien is lost, for the obligation of the purchaser is taken instead of the purchase money, or a direct security for

[5] Norman v. Harrington, 62 Ala. 107.

[6] Reese v. Kinkead, 18 Nev. 126. This lien is valid at least as against all but partnership creditors: Reese v. Kinkead, 18 Nev. 126.

[6a] Ross v. Clark, 80 N. E. 275, citing text.

[7] Payne v. Avery, 21 Mich. 524; Whitelay v. Central Trust Co., 76 Fed. 74, 22 C. C. A. 67, 34 L.R.A. 303.

it."[8] An obligation to support the grantor for life cannot be made the subject of a vendor's implied lien.[9] A woman conveyed by deed the west half of a quarter section of land to her brother, who executed back a lease of it to her, and agreed to build for her a house on the east half, she agreeing to permit him and his wife to occupy a portion of it during their natural lives, and also to lease to him the whole quarter section for the term of her own natural life for a certain share of the crops. These conditions, the court decided, should be construed together, and being too indefinite to be estimated at a fixed sum, a lien on the land for their enforcement could not exist.[1] A vendor is not entitled to a

[8] Patterson v. Edwards, 29 Miss. 67, 71, per Mr. Justice Handy. And see Vandoren v. Todd, 2 Green Ch. 397; Chapman v. Beardsley, 31 Conn. 115; Hiscock v. Norton, 42 Mich. 320; Sears v. Smith, 2 Mich. 243; Ross v. Clark, 225 Ill. 326, 80 N. E. 275.

[9] Arlin v. Brown, 44 N. H. 102; Chase v. Peck, 21 N. Y. 581; McKillip v. McKillip, 8 Barb. 552; Brawley v. Cawtron, 8 Leigh, 522; Gard v. Gard, 108 Cal. 19. See, also, Camp v. Gifford, 67 Barb. 434; Peters v. Tunnell, 43 Minn. 473, 19 Am. St. Rep. 252; Meigs v. Dimmock, 6 Conn. 458; Burroughs v. Burroughs, 50 So. 1025; Salyers v. Smith, 67 Ark. 526, 55 S. W. 936. A lien, it is held in some cases, is not created by an agreement to assume a debt or collateral obligation of the vendor: Patterson v. Edwards, 29 Miss. 67; Chapman v. Beardsley, 31 Conn. 115; Long v. Burke, 2 Bush (Ky.), 90; Parrot v. Sweetland, 3 Myl. & K. 655; Lea v. Fabbri, 45 N. Y. Supr. Ct. 361. In other cases it is held that the lien does exist: Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57; Williams v. Crow, 84 Mo. 298; Elliott v. Plattor, 43 Ohio St. 198. In Pleasants v. Fay, 13 App. D. C. 237, it was held that where the vendee assumed the payment of a first lien on the property and it was afterwards discovered that the vendor had previously to the transfer satisfied the lien which fact he had overlooked, the vendor had a lien for the amount paid by him to satisfy the lien. In the absence of such an agreement to assume the payment of the lien, the vendor would have a lien for the amount expended by him as it was a part of the purchase consideration.

[1] Hiscock v. Norton, 42 Mich. 320. Said Graves, J., in delivering the opinion of the court: "The general doctrine relative to what is understood as the vendor's lien upon realty rests on the postulate that it is not equitable for one to absorb another's wealth without recompense; and, therefore, as between

lien for damages resulting from the fraudulent representation by the vendee as to the value of chattels taken in part payment of the purchase price, but if the vendee is obligated to pay a given sum of money by the contract of purchase, and thereafter through fraudulent representations induces the vendor to accept a chattel for the purchase price, the vendor, upon discovering that the representations are fraudulent, may tender back the chattel and enforce a lien for the amount represented by it. In the first instance the claim for damages is too uncertain to be covered by the lien, but in the second instance the pre-existing contract is binding, and when its fraudulent modification is rescinded, the contract itself is left to stand, with its attendant right of lien in the vendor.[2]

§ 1256a. When purchase price may be paid in money or other mode.—Where the purchase price is to be paid

grantor and grantee, the court will intend that the purchased estate was to be held for the unpaid purchase money, unless circumstances are found which repel the presumption. And among the circumstances which will have this effect are reckoned, *first*, the formation of arrangements between the parties, which suffice to make out that reliance was not placed on any unwritten claim against the land; and second, the introduction of such schemes by the parties, and their blending of bargainings in such way as to disable the court from ascertaining and defining with any certainty the present amount in money, or from identifying the charge sought to be enforced." And see Jordan v. Wimer, 45 Iowa, 65; Dubois v. Hull, 43 Barb. 26; McDole v. Purdy, 23 Iowa, 277; Where personal property to be delivered as a part of the purchase price was in fact not delivered, the vendor, in order to maintain a suit to enforce a vendor's lien for the amount of the personal property, must show that the personal property had an agreed pecuniary value. Ross v. Clark, 225 Ill. 326, 80 N. E. 275. Where a vendee is given possession of realty under a promise to make such annual payments as she could, a lien for the purchase price is reserved by the vendor: Hubbell v. Henrickson, 175 N. Y. 175, 67 N. E. 302; Welch v. Farmers Loan & Trust Co., 165 Fed. 561, 91 C. C. A. 399; Fostoria Gold Min. Co. v. Hazard, 99 Pac. 758; Cox v. Smith, 125 S. W. 437.

[2] Graham v. Moffett, 119 Mich. 303, 78 N. W. 132, 5 Detroit Leg. N. 825, 75 Am. St. Rep. 393; Jones v. Wolfe, 42 S. W. 216. See, also, Rhodes v. Arthur, 92 Pac. 244.

in money, though there may be a stipulation that it may be discharged in something else, a vendor's lien may be enforced for the amount remaining unpaid when there has been a failure to discharge the indebtedness at the time agreed on.[3] If, in addition to the payment of a specified sum of money, the purchaser agrees to fence the land purchased, and to construct stock gaps at places where the outer fences are crossed, and to provide road crossings at convenient places, the purchaser's failure to perform these acts will not create or sustain a vendor's lien for the amount of damages that may be caused by such failure. The remedies of the vendor are an action at law to recover damages, or a suit in equity to enjoin the use of the land until compliance with the terms of the purchase.[4]

§ 1257. **Extent of lien.**—The lien extends to interest accruing on the purchase price,[5] and the widow's right to dower may be subject to it.[6] It extends also to judicial sales.[7] A note, the consideration for which is in part unpaid purchase money, will be secured by the lien for that part, when the amount can be determined.[8] The lien may effect the

[3] Parrish v. Hastings, 102 Ala. 414, 48 Am. St. Rep. 50.

[4] Parrish v. Hastings, 102 Ala. 414, 48 Am. St Rep. 50.

[5] Succession of Richardson, 10 La. Ann. 616; Green v. Johnson, 44 S. W. 6. The lien will attach to a leasehold interest: Bratt v. Bratt, 21 Md. 578; Richardson v. Bowman, 40 Miss. 782; Choate v. Tighe, 10 Heisk. (Tenn.) 621; Turkes v. Reis, 14 Abb. N. Cas. 26; Cole v. Smith, 24 W. Va. 287. But see *contra:* Cade v. Brownlee, 15 Ind. 369, 77 Am. Dec. 95.

[6] Fisher v. Johnson, 5 Ind. 492; Boyd v. Martin, 9 Heisk. 382; Nutter v. Fouch, 86 Ind. 451; Noyes v. Kramer, 54 Iowa, 22; Martin v. Smith, 25 W. Va. 579.

[7] Buford v. McCormick, 57 Ala. 428; Mims v. Macon & W. R. R. Co., 3 Ga. 333.

[8] Russell v. McCormick, 45 Ala. 587, 6 Am. Rep. 707; Swain v. Cato, 34 Tex. 395. See, also, Sutton v. Sutton, 39 Tex. 549; Hicks v. Morris, 57 Tex. 658; Peters v. Tunnell, 43 Minn. 473, 19 Am. St. Rep. 252; Strongfellow v. Ivie, 73 Ala. 209; McCandlish v. Keen, 13 Gratt. (Va.) 615; Wilkinson v. Parmer, 82 Ala. 367; Russell v. McCormick, 45 Ala. 587, 6 Am. Rep. 707. See Harris v. Hanks, 25 Ark. 510. But see *contra:* Clark v. Curtis, 11

separate real estate of a married woman.[9] Where land is sold for the consideration of a quantity of cotton to be delivered in the future, the vendor has no lien on the land. The breach of the contract does not create a debt, but is an injury, the remedy for which is damages.[1] Where a fee for legal services is a part of the consideration for the sale of land, its payment is secured by a vendor's lien which will inure to the benefit of the attorney.[2] The lien extends to improvements subsequently placed on the real property and it is superior to a mechanic's lien for the improvements.[3] The lien will cover the manufactured product from timber which was standing on the land at the time of the sale, but which was subsequently cut.[4]

§ 1257a. **Other interests in land to which lien will attach.**—The lien will attach to an equitable interest in land.[5] The lien will also attach to a pre-emption claim upon

Leigh (Va.), 585; Cole v. Smith, 24 W. Va. 287.

[9] Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; Weinberg v. Rempe, 15 W. Va. 829; Jackson v. Rutledge, 3 Lea (Tenn.), 626, 31 Am. Rep. 655; Chilton v. Braiden, 2 Black, 458; Morrison v. Brown, 83 Ill. 562; Jackson v. Rutledge, 3 Lea (Tenn.), 626, 31 Am. Rep. 655.

[1] Harris v. Hanie, 37 Ark. 348. A vendor, under an agreement to sell real estate with a dwelling house thereon, may enforce a lien for the balance of the purchase price, though he gave a deed before the erection of the house was complete. Shaw v. Tabor, 146 Mich. 544, 109 N. W. 1046, 13 Detroit Leg. N. 856.

[2] Morrison v. Thomas, 48 S. W. 500, 92 Tex. 329.

[3] Watson v. Markham & Reese, 33 Tex. Civ. App. 476, 77 S. W. 660.

[4] Spies v. Butts, 59 W. Va. 385, 53 S. E. 897.

[5] Ortman v. Plummer, 52 Mich. 76; Russell v. Watts, 41 Mich. 602; 93 Am. Dec. 270; Johns v. Sewell, 33 Ind. 1; Bledsoe v. Games, 30 Mo. 448; Poe v. Paxton, 26 W. Va. 607; Fleece v. O'Rear, 83 Ind. 200; Barrett v. Lewis, 106 Ind. 120; Jones v. Parker, 51 Wis. 218; Loomis v. Davenport etc. R. Co., 3 McCrary (U. S.), 489; Dwenger v. Brannigan, 95 Ind. 221; Iglehart v. Armiger, 1 Bland. (Md.) 526; Logwood v. Robertson, 62 Ala. 523; Carey v. Boyle, 53 Wis. 574; Warren v. Fenn, 28 Barb. 333; Ligon v. Alexander, 7 J. J. Marsh. (Ky.) 288. But see to contrary effect: Strider v. King, 3 Cranch (C. C.), 67;

public lands.[6] It cannot, however, be enforced against the proceeds arising from a sale of the interest.[7] It extends to a right of way over the land of the vendor.[8] The lien is lost as to anything which, by severance from the real estate, has become personal property.[9] The lien may be enforced by mortgagees.[1] One to whom money has been allowed in partition may have a lien.[2] Guardians may enforce the lien.[3] The lien may be enforced by the vendor or his personal representatives.[4] A vendor's lien is a chose in action.[5] Where the owner of land makes a parol gift of it to his daughter, and she sells the land to another, taking his notes for the purchase price, and the grantor executes a deed to the vendee, the daughter, on nonpayment of the notes, is entitled to enforce a lien.[6] A third person to whom the purchase money is payable has a lien.[7] The lien will not be enforced against rents and profits.[8]

Dingus v. Minneapolis Imp. Co., 98 Va. 737, 37 S. E. 353, 2 Va. Sup. Ct. Reg. 604.

[6] Pierson v. David, 1 Iowa, 23.

[7] Mims v. Lockett, 23 Ga. 237, 68 Am. Dec. 521; Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229.

[8] Hempfield R. Co. v. Thornburg, 1 W. Va. 261; Big Sandy Lumber Co. v. Kuteman, 41 S. W. 172.

[9] Manning v. Frazier, 96 Ill. 279.

[1] Barrett v. Lewis, 106 Ind. 120.

[2] Baltimore etc. R. Co. v. Trimble, 51 Md. 99.

[3] Ferguson v. Shepherd, 58 Miss. 804.

[4] Evans v. Enloe, 70 Wis. 345; Robinson v. Appleton, 22 Ill. App. 351, 124 Ill. 276; Wright v. Heffner, 57 Tex. 518; Keith v. Horner, 32 Ill. 534; Leeper v. Lyon, 68 Mo. 216.

[5] Evans v. Enloe, 70 Wis. 345.

[6] Russell v. Watt, 41 Miss. 602, 93 Am. Dec. 270. See, also, Holloway v. Ellis, 25 Miss. 103; Stewart v. Hutton, 3 J. J. Marsh. 178; Ligon v. Alexander, 7 J. J. Marsh. 289.

[7] Whetsel v. Roberts, 31 Ohio St. 503; Latham v. Staples, 46 Ala. 462; Johnson v. Townsend, 77 Tex. 639; Francis v. Wells, 2 Colo. 660; Nichols v. Glover, 41 Ind. 24; Young v. Hawkins, 74 Ala. 370; Tysen v. Wabash R. Co., 15 Fed. Rep. 763; Carver v. Eads, 65 Ala. 190; Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57; Louisiana Nat. Bank v. Knapp, 61 Miss. 485; Mitchell v. Butt, 45 Ga. 162; Mize v. Barnes, 78 Ky. 506; De Lisle v. Moss, 34 La. Ann. 164.

[8] Wilson v. Ewing, 79 Ky. 549; Little v. Brown, 2 Leigh (Va.), 253; Collins v. Richart, 14 Bush. (Ky.), 621; Wooten v. Bellinger, 17 Fla. 289.

§ 1258. **Assignment of lien.**—The general rule is that the vendor's implied lien is not assignable.[9] But in some States an assignment of the lien is permitted.[1] "An equitable

[9] Brush v. Kinsley, 14 Ohio, 20; Tiernan v. Beam, 2 Ohio, 383, 15 Am. Dec. 557; Jackman v. Hallock, 1 Ohio, 318, 13 Am. Dec. 627; Horton v. Horner, 14 Ohio, 437; Cowan v. Sharpe, 11 Heisk. 450; Tharpe v. Dunlap, 4 Heisk. 674; McWhirter v. Swaffer, 6 Baxt. 342; Green v. Demoss, 10 Humph. 371; Pillow v. Helm, 7 Baxt. 545; Bowlin v. Pearson, 4 Baxt. 341; Carlton v. Buckner, 28 Ark. 66; Ross v. Heintzen, 36 Cal. 313; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Hecht v. Spears, 27 Ark. 229, 11 Am. Rep. 784; Kimble v. Esworthy, 6 Bradw. 517; Williams v. Christian, 23 Ark. 255; Lewis v. Covillaud, 21 Cal. 178; Williams v. Young, 21 Cal. 227; Welborn v. Williams, 9 Ga. 86, 52 Am. Dec. 427; Jones v. Doss, 27 Ark. 518; Rogers v. James, 33 Ark. 77; Shall v. Biscoe, 18 Ark. 142; Hutton v. Moore, 26 Ark. 382; Elder v. Jones, 85 Ill. 384; Webb v. Robinson, 14 Ga. 216; Iglehart v. Armiger, 1 Bland. 519; Dixon v. Dixon, 1 Md. Ch. 220; Keith v. Horner, 32 Ill. 524; Dayhuff v. Dayhuff, 81 Ill. 499; Stagg v. Small, 4 Bradw. 192; Carpenter v. Mitchell, 54 Ill. 126; Moshier v. Meek, 80 Ill. 79; Richards v. Leaming, 27 Ill. 431, 81 Am. Dec. 239; White v. Williams, 1 Paige, 502; Pitts v. Parker, 44 Miss. 247; Walker v. Williams, 30 Miss. 165; Lindsey v. Bates, 42 Miss. 397; Skaggs v. Nelson, 25 Miss. 88; Stratton v. Gold, 40 Miss. 778; Briggs v. Hill, 6 How. 362, 38 Am. Dec. 441; McLaurie v. Thomas, 39 Ill. 291; Wing v. Goodman, 75 Ill. 159; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Gruhn v. Richardson, 128 Ill. 178; First Nat. Bank v. Salem Capital Flour Mills, 39 Fed. Rep. 89; Martin v. Martin, 45 N. E. 1007, 164 Ill. 640, 56 Am. St. Rep. 219; Haslam v. Haslam, 79 Utah, 1, 56 Pac. 243; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732; Snyder v. Snyder, 115 N. Y. S. 993; Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114; Lennox v. Sanders, 54 S. W. 1076; Big Sandy Lumber Co. v. Kuteman, 41 S. W. 172.

[1] Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587; Moore v. Raymond, 15 Tex. 554; White v. Downs, 40 Tex. 225; Kern v. Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360; Honore v. Bakewell, 6 Mon. B. 67, 43 Am. Dec. 147; Wells v. Morrow, 38 Ala. 125; Buford v. McCormick, 57 Ala. 428; Green v. Casey, 70 Ala. 417; Nichols v. Glover, 41 Ind. 24; Johnston v. Gwathmey, 4 Litt. 317, 14 Am. Dec. 135; Eubank v. Poston, 5 Mon. 285; White v. Stover, 10 Ala. 441; Lang v. Wilkinson, 57 Ala. 259; Roper v. McCook, 7 Ala. 318; Ripperdon v. Cozine, 8 Mon. B. 465; Broadwell v. King, 3 Mon. B. 449; Wiseman v. Hutchinson, 20 Ind. 40; Fisher v. Johnson, 5 Ind. 492. And see Hightower v. Rigsby, 56 Ala. 126; Bankhead v. Owen, 60 Ala. 457; Thomas v. Wyatt, 5 Mon. B. 132; Andrews v. Hobgood, 1 Lea (Tenn.), 693;

lien is an encumbrance upon land, which can only be held by a vendor; and although assets may be marshaled, so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit from such lien; nor can it, like a bond or mortgage, be assigned, because it is not expressed in writing, or in any separate contract; but exists only as an inseparable, equitable incident of the contract of purchase, and is raised by construction of equity, in favor of the vendor only. To allow it to pass by an assignment of the claim for the purchase money, or by a transfer of the bonds or notes given as security for the payment of the purchase money, would be of the most ruinous consequences to titles to real estates." [2] An assignment, under the general rule, even by express contract, is ineffectual.[3] But the lien may revive, if the note is subsequently acquired by the original vendor.[4] If a judgment for the purchase money be assigned, the lien does not thereby pass.[5]

§ 1259. **Beneficial owner.**—A lien may be enforced in favor of one who is beneficially the owner of the land, although not the grantor in the deed. Thus, a father made a

Griggsby v. Hair, 25 Ala. 327; Robertson v. Guerin, 50 Tex. 317; Planters' Bank v. Dodson, 17 Miss. (9 Smedes & M.) 527; Peet v. Beers, 4 Ind. 46; Lusk v. Hopper, 3 Bush. 179. As to the rule in Mississippi, see Code, 1880, § 1124, and Louisiana Bank v. Knapp, 61 Miss. 485. A husband who has sold land, and who has the note for the unpaid purchase price made to his wife as a gift, thereby assigns to her the lien: Wilkinson v. May, 69 Ala. 33; Otis v. Gregory, 111 Ind. 504; Bates v. Childers, 4 N. Mex. 347; Dickason v. Fisher, 137 Mo. 342, 37 S. W. 1114; Mulky v. Harsell, 68 N. E. 689, 31 Ind. App. 595.

[2] Iglehart v. Armiger, 1 Bland, 519, 524.

[3] McLaurie v. Thomas, 39 Ill. 291; Keith v. Horner, 32 Ill. 524.

[4] Rogers v. James, 33 Ark. 77; Cotten v. McGehee, 54 Miss. 510; Bancroft v. Cosby, 74 Cal. 583. See Bernays v. Field, 29 Ark. 218; Kelly v. Payne, 18 Ala. 371; Lindsey v. Bates, 42 Miss. 397; White v Williams, 1 Paige, 502; Hallock v. Smith, 3 Barb. 267.

[5] Turner v. Horner, 29 Ark. 440.

parol gift of land to his daughter, and she subsequently sold the land, taking the purchaser's notes for the purchase money, and the father executed a deed to the purchaser. The court decided that although the daughter was not the grantor, she was the vendor, and that she could claim a lien for the unpaid purchase money.[6]

§ 1260. **Transfer of note as collateral security.**—An exception to the general rule that a vendor's lien is not assignable is said to exist in cases where the assignment is made as collateral security for the vendor's indebtedness. In such cases, the assignee who holds the lien for the assignor's benefit as well as his own is subrogated to the equities of the assignor.[7]

§ 1261. **Excess at execution sale.**—Where land is sold on execution, and the sum bid is in excess of the amount necessary to satisfy the judgment, for the payment of which surplus credit is given to the purchaser by consent of the defendant in execution, a vendor's lien will exist to secure

[6] Russell v. Watt, 41 Miss. 602, 93 Am. Rep. 270. Where a purchaser died intestate, leaving minor children, no administration, however, being had on his estate, and an action was brought by the vendor against the widow and the children, the latter being represented by their guardian *ad litem*, in which action the vendor obtained a decree enforcing a vendor's lien upon the land, in pursuance of which the land was afterward sold to the vendor, the court held that so far as the title of the children by succession was affected by the decree, the decree was valid; and further, that the children could not, after attaining majority, maintain ejectment for the land: Meroux v. Weber, 53 Cal. 130; Hurst v. Hurst, 76 S. W. 325, 25 Ky. Law Rep. 714; Simily v. Adams, 88 Mo. App. 621; Wood v. Schoolcraft, 145 Mich. 653, 108 N. W. 1075, 13 Detroit Leg. N. 655, holding that the grantor is a necessary party to a suit by the beneficial owner to enforce the lien.

[7] Crawley v. Riggs, 24 Ark. 563; Carleton v. Buckner, 28 Ark. 66; Hallock v. Smith, 3 Barb. 267; Plowman v. Riddle, 14 Ala. 169, 48 Am. Dec. 92. See Chapman v. Liggett, 41 Ark. 292; Elmslie v. Thurman, 40 So. 67, 87 Miss. 537.

its payment.[8] The case cited in support of this statement is somewhat peculiar. The court said it was unable to find any case in point, and the author knows of none. But the reasoning of the court seems sound: "If, then, in this case, the plaintiff and sheriff, at his request, made through his agent, extended time to defendant for so much of his bid as plaintiff rightfully controlled it is not perceived that the transaction is not in substance *pro tanto* a sale of the land consummated through the powers of a sheriff's deed. The substantial principle upon which the vendor's lien is said to rest, 'that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it, and not pay the full consideration money,' seems applicable to the case. The facts of the case seem to us to be such as entitled the plaintiff in equity to the lien. By his consent only was it that defendant was enabled to receive a deed without paying in full in cash. The deed to that extent may be regarded as the act of the plaintiff. So regarding it, the law would uphold the lien, unless it is waived either expressly or by acts showing such intention." [9]

§ 1262. **Waiver of lien.**—If the grantor takes a mortgage or other independent security for the payment of the purchase money, he waives the lien.[1] If a mortgage is taken,

[8] Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44.

[9] Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44, per Gould, J. A purchaser in possession at the time land is sold under a decree enforcing a vendor's lien is not entitled to the crops growing on the land at the time of the sale: Johnston v. Smith, 70 Ala. 108. But see Crans v. Hamilton County Commissioners, 87 Ind. 162.

[1] Orrick v. Durham, 79 Mo. 174; Dibblee v. Mitchell, 15 Ind. 425, 77 Am. Dec. 99; Lewis v. Covillaud, 21 Cal. 178; McLaurie v. Thomas, 39 Ill. 291; Briscoe v. Callahan, 77 Mo. 134; Denny v. Steakly, 2 Heisk. 156; McDonough v. Cross, 40 Tex. 251; Johnson v. Godden, 33 Ark. 600; Dudley v. Dickson, 14 N. J. Eq. 252; Mayham v. Coombs, 14 Ohio, 428; McGonigal v. Plummer, 30 Md. 422; Vail v. Foster, 4 N. Y. 312; Sharp v. Collins, 74 Mo. 266; Wilson v. Sawyer, 74 Ill. 473; Stuart v. Harrison, 52 Iowa, 511; Richards v. McPherson,

the fact that the security is inadequate, or that the mortgage is defective, does not revive the lien.[2] And the lien is waived, notwithstanding the security taken is void.[3] The security, however, should be such as shows an intention to waive the lien.[4] If the vendor accept a deed of other land in part payment of the consideration, he waives his lien, notwithstanding the title to the land conveyed to him may be imperfect or invalid.[5] If the deed so taken contains a covenant of war-

74 Ind. 158; Richardson v. Ridgely, 8 Gill & J. 87; Follett v. Reese, 20 Ohio, 546, 55 Am. Dec. 472; Hawkins v. Thurman, 1 Idaho, N. S., 598; Vandoren v. Todd, 2 Green Ch. 397; Brown v. Christie, 35 Tex. 689; Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669; Adams v. Buchanan, 49 Mo. 64; Masters v. Templeton, 92 Ind. 447; Carico v. Farmers & Merchants' Bank, 33 Md. 235; Durette v. Briggs, 47 Mo. 356; Fish v. Howland, 1 Paige, 20; Richards v. Leaming, 27 Ill. 431, 81 Am. Dec. 239; Kimble v. Esworthy, 6 Bradw. (Ill.) 517; Warner v. Scott, 63 Ill. 368; Griffin v. Blanchar, 17 Cal. 70; Gnash v. George, 58 Iowa, 492; Brinkerhoff v. Vansciven, 3 Green Ch. 251; Neal v. Speigle, 33 Ark. 63; Parker County v. Sewell, 24 Tex. 238; Anderson v. Griffith, 66 Mo. 44; Kirkham v. Boston, 67 Ill. 599; Nairin v. Prowse, 6 Ves. 752; Walker v. Struve, 70 Ala. 167; Emison v. Whittelsey, 55 Mo. 254; Gilman v. Brown, 1 Mason, 207; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Camden v. Vail, 23 Cal. 633; Spears v. Taylor, 42 So. 1016; Dalliba v. Riggs, 67 Pac. 430, 7 Idaho, 779; Buffalo Oölitic Limestone Quarries Co. v. Davis, 90 N. E. 327.

[2] Partridge v. Logan, 3 Mo. App. 509; Hunt v. Waterman, 12 Cal. 301.

[3] Camden v. Vail, 23 Cal. 633. See Himes v. Langley, 85 Ind. 77; Boyer v. Austin, 75 Mo. 81.

[4] Dubois v. Hull, 43 Barb. 26; Corlies v. Howland, 26 N. J. Eq. 311; Emison v. Whittlesey, 55 Mo. 254; Lawrence v. Meyer, 35 Ark. 104; De Forest v. Holum, 38 Wis. 516; Thames v. Caldwell, 60 Ala. 644; Sanders v. McAffee, 41 Ga. 684. See Lavender v. Abbott, 30 Ark. 172; Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669; Cordova v. Hood, 17 Wall. 1; Dibblee v. Mitchell, 15 Ind. 435, 77 Am. Dec. 99; Thomason v. Cooper, 57 Ala. 500; Christian v. Austin, 36 Tex. 540; Ellis v. Singletary, 45 Tex. 27; Faver v. Robinson, 46 Tex. 204; Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328. See Remington v. Higgins, 54 Cal. 629. Where such an intention is not shown the lien is not waived: Ames v. Wheeling & L. E. Ry. Co., 17 Ohio Civ. Ct. R. 684, 9 O. C. D. 443.

[5] Willard v. Reas, 26 Wis. 540. See Hare v. Van Deusen, 32 Barb. 92. But see Bishop v. Snell, 37 Ala. 90.

ranty, the vendor's remedy is on the covenant.[6] An agreement by the vendor to accept payment of the purchase price out of proceeds of mines sold is not a waiver of the vendor's lien.[7] Where land and personal property are sold for a gross sum, it being impossible to determine the proportion paid for the land, it is fair to presume that the vendor did not look to the land alone, and had waived his lien.[8] The lien is not waived by an agreement in a deed made by the grantor to his daughter that he should reside on the land during his lifetime.[9] A vendor's lien having once attached can only be defeated by the voluntary act of the holder thereof unless the rights of innocent purchasers without notice intervene.[1] The lien may be waived, or such waiver may be inferred from any conduct on the part of the vendor which shows that he does not rely on the lien.[2] Thus where the grantor agrees to look to payment of the purchase price from a particular fund he waives the lien.[3] A waiver of the lien cannot be presumed from the fact that the vendor executed a deed after the vendee had refused to mortgage the property in order to secure the purchase price, and had stated that he desired to receive the property free from all incumbrances.[4] Neither can a waiver of the lien be shown from the mere fact that the clause in the form used providing for the retention of a lien was eliminated.[5] The vendor's lien is lost if the vendor, after transferring the estate, forcibly takes it back and appropriates it to his own use, as equity requires that he who comes into a court of equity must do so with clean hands.[6]

[6] Willard v. Reas, 26 Wis. 540.

[7] Brisco v. Minah Consol. Min. Co., 82 Fed. 952. See, also, Burroughs v. Gilliland, 43 So. 301.

[8] Stringfellow v. Ivie, 73 Ala. 209.

[9] Webster v. McCullough, 61 Iowa, 496.

[1] Yetter v. Fitts, 113 Ind. 34, 14 N. E. 707; Jordan v. Buena Vista Co., 95 Va. 285, 28 S. E. 321.

[2] McKinnon v. Johnson, 54 Fla. 538, 45 So. 451.

[3] Brown v. Bradford, 103 Iowa, 378, 72 N. W. 648.

[4] Bray v. Booker, 8 N. D. 347, 79 N. W. 293; Finnell v. Finnell, 156 Cal. 589, 105 Pac. 740.

[5] Springman v. Hawkins, 113 S. W. 966.

[6] Minah Consol. Min. Co. v. Bris-

§ 1263. **Taking a note.**—It is presumed that the vendor intends to preserve his lien, and, if he takes a note, or the personal obligation of the vendor alone, this is but taking an evidence of the indebtedness. By taking the personal note of the vendee, the vendor does not waive the lien.[7] A subsequent acceptance of a new note, with accrued interest, for the original one does not destroy the lien.[8] But where notes payable at different times have been taken for the purchase money, and the grantee has contracted to sell the land, the grantor, in advance of the maturity of the notes, cannot obtain a decree that the grantee shall not sell the land with-

coe, 89 Fed. 891, 32 C. C. A. 390.

[7] Conlee v. Conlee, 87 Ind. 249; Taylor v. Hunter, 5 Humph. 569; Plowman v. Riddle, 14 Ala. 169, 48 Am. Dec. 92; Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60; Andrews v. Scotten, 2 Bland. 629; Evans v. Goodlet, 1 Blackf. 246; Bradford v. Harper, 25 Ala. 337; White v. Williams, 1 Paige, 502; Thornton v. Knox, 6 Mon. B. 74; Garson v. Green, 1 Johns. Ch. 308; Clark v. Hunt, 3 Marsh. J. J. 553; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Denny v. Steakly, 2 Heisk. 156; Corlies v. Howland, 26 N. J. Eq. 311; Honore v. Blakewell, 6 Mon. B. 67, 43 Am. Dec. 147; Pinchain v. Collard, 13 Tex. 333; Christian v. Austin, 36 Tex. 540; Warren v. Fenn, 28 Barb. 333; Aldridge v. Dunn, 7 Blackf. 249, 41 Am. Dec. 224; Mackreth v. Symmons, 15 Ves. 329; Brinkerhoff v. Vansciven, 3 Green Ch. 251; Cummings v. Moore, 61 Miss. 184; Walker v. Sedgwick, 8 Cal. 398; Truebody v. Jacobson, 2 Cal. 269; Chapman v. Chunn, 5 Ala. 397; Cox v. Fenwick, 3 Bibb, 183; Henley v. Stemmons, 4 Mon. B. 131; Lagow v. Badollett, 1 Blackf. 416, 12 Am. Dec. 258; Walker v. Sedgwick, 8 Cal. 398. See Tedder v. Steele, 70 Ala. 347; Parker v. McBee, 61 Miss. 134; Ballard v. Complin, 67 N. E. 505, 161 Ind. 16; Lyon v. Clark, 94 N. W. 4, 10 Detroit Leg. N. 13, 132 Mich. 521; Knight v. Knight, 21 So. 407, 113 Ala. 597; Ross v. Whitson, 14 Tenn. 50; Mansfield v. Dameron, 42 W. Va. 794, 26 S. E. 527, 57 Am. St. Rep. 884; Zook v. Thompson, 82 N. W. 930, 111 Iowa, 463; Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591; Elswick v. Matney, 116 S. W. 718; Brandenburg v. Norwood, 66 S. W. 587; Rewis v. Williamson, 51 Fla. 529, 41 So. 449. Taking a note made at the grantor's request to a third party does not waive the lien; Ballard v. Camplin, 161 Ind. 16, 67 N. E. 505.

[8] Marshall v. Marshall, 42 S. W. 353; Schmidt v. Gankler, 120 N. W. 746, 156 Mich. 243, 16 Detroit Leg. N. 97.

out informing the purchaser that the grantor has a lien upon it.[9] Where the consideration recited in the deed was: "For and in consideration of five thousand dollars in the stock of said company, and the further sum of two thousand five hundred dollars in bonds of the said company, by the party of the second part to the party of the first part, in hand paid, the receipt whereof is hereby acknowledged," it was held that no lien was reserved.[1] If the note given for the purchase money provides that the maker shall pay attorneys'

[9] Taylor v. Hunter, 5 Humph. 569. Said Reese, J., in delivering the opinion of the court: "The nature of the lien existing between vendor and vendee cannot be, and ought not to be, changed in nature or extent by judicial declaration and injunction in chancery, uncoupled with a sale of the premises for the satisfaction of the lien. The order that the complainant has obtained from the chancellor upon the defendants, that they shall not sell the land without telling the purchaser that the complainant's lien exists, is unsustained, we imagine, by principle or precedent. Suppose he does sell without such announcement, does Searcy become debtor to the complainant instead of the land? Or shall he be merely proceeded against as for a contempt? The effort is to create a new species of judicial mortgage. This cannot be done. It is incident to the nature of this lien that the vendor may lose it by a fair sale and conveyance on the part of the vendee, to a third person having no notice of its existence. It is the vendee's [vendor's] business, if he apprehends such a contingency, to withhold the title, or take a mortgage or personal security, or make the existence of his right notorious. But to attain his purpose in the manner attempted in this bill would be to change the nature and extent of the right." The fact that the note was executed at the grantor's direction to a third person will not destroy the lien: Joiner v. Perkins, 59 Tex. 300.

[1] Keith v. Wolf, 5 Bush, 646. Said the court, per Robertson, J.: "To give a constructive lien, the statute contemplates and requires such a recital as will clearly notify creditors and subsequent purchasers that the consideration, or a portion of it, and *exactly what portion*, remains unpaid. The recital in this case does not show that any portion of the consideration, nor if any, precisely how much, was unpaid. The stock, being an investment and a vendible commodity, was indisputably a payment of five thousand dollars; and why should not the company's printed bonds, payable in ten years, with interest coupons attached, be equally considered an investment and a vendible commodity. Why are they not as much so as the five-twenty bonds of the United States? The only difference

fees equivalent to ten per cent of the amount due, if placed in the hands of an attorney for collection, the holder is entitled to collect such attorneys' fees, when the notes are placed in an attorney's hands for collection, though the agreement with him was that he should have this amount if he could collect it from the land sold, by which agreement, the grantor did not personally become liable for the payment of attorneys'

between them is, that one is issued by a political and the other by a civil corporation, and they are all used for the same current purposes. Surely the recital as to these company bonds could not give certain notice that they had not been, like the stock, accepted as payment. On the contrary, both their character and the letter of the recital import payment, and, if needful, this construction is fortified by the intrinsic incredibility that the company in such a contract would guaranty its bonds by an extraordinary encumbrance, which might embarrass its road and disturb public convenience." See Dixon v. Gayfere, 17 Beav. 421; Earl of Jersey v. Britton Ferry Floating Dock Co., Law R. 7 Eq. 409; Clarke v. Royle, 3 Sim. 499; Buckland v. Pocknell, 13 Sim. 406; Long v. Burke, 2 Bush, 90; Ledford v. Smith, 6 Bush, 129; Phillips v. Skinner, 6 Bush, 662. A judgment on the note preserves the lien: Beck v. Tarrant, 61 Tex. 402; Slaughter v. Owens, 60 Tex. 668. In Walton v. Young, 31 So. 448, 132 Ala. 150, it was held that the vendor's lien was waived by a deed reciting the consideration, not as so much money evidenced by notes, but as certain described notes of the vendee. Said the court: "It is not recited in the deed that it is made in consideration of so much money evidenced by said promissory notes, but the recital is that the consideration for the conveyance is the particular promissory notes described. It is just as if the recited consideration and the consideration in fact had been a horse or other chattel which had been received in payment for the land. After the notes had been signed and delivered to complainants, and they had executed the deed, there was no purchase money due for the land. The notes had fully paid the consideration, and thereafter complainants had no standing in any court as vendors to recover the price of the land, but their only rights and remedies were as the payees of these promissory notes, and as such no other than they would have had had the notes been for the price of chattels, for money loaned, or what not. It is not the case of a vendee executing to his vendor a promissory note to evidence or secure the payment of the price of the land, but it is the case of the note of the purchaser being taken as a substitute for or in novation of the purchase price, so that, while there is a liability on the note, no debt for the price exists, and, of course, no lien for purchase money arises."

fees.[2] But the vendor cannot in an action to foreclose the contract of sale have the fees of an abstractor taxed as costs.[3]

§ 1264. **Taking a check.**—If the vendee gives a check upon a bank for the amount of a cash payment, but withdraws before the presentation of the check the funds which he had on deposit, so that the check is not paid, the vendor does not lose his lien. Such act of the vendee is a fraud upon the vendor.[4] So the lien is not waived if the check taken by the vendor is by consent of the parties returned to the drawer, and a note taken. The check is not payment. "It was no more a payment than the execution or renewal of a bond or note or bill of exchange for the consideration, which is accepted, but not paid, which was formerly regarded as a payment, or rather, as a surrender of the lien, but which, by later and more enlightened decisions has been determined otherwise. The lien is a lien to secure the *payment* of the consideration and *prima facie* it continues until payment is made, or it is waived or abandoned by some overt act on the part of the claimant, indicating an intention to do so, as taking and looking to other security for the payment, or until it has been lost by the transfer of the land to an innocent purchaser, for a valuable consideration without notice, or the means of notice. The bond, note, bill of exchange, or check is but the evidence of the amount due, and the means by which payment may be obtained or coerced, and may be changed or renewed from time to time, without actual payment. And

[2] Rutherford v. Gaines, 126 S. W. 261.

[3] Boynton v. Lalinger, 126 N. W. 369.

[4] Madden v. Barnes, 45 Wis. 135, 30 Am. Rep. 703. In this case the funds of the vendee were withdrawn two weeks, and the check presented nearly four weeks after its date. See, also, O'Connor v. Smith, 40 Ohio St. 214. And see Arnholt v. Hartwig, 73 Mo. 485. Taking a certificate of deposit does not waive the lien: Mims v. Macon etc. R. Co., 3 Ga. 333; Dowling v. McCall, 124 Ala. 633, 26 So. 959.

from such change or renewal, the presumption cannot rationally be indulged that the vendor intended to surrender his lien, more than that he intended to surrender his debt. By any fair interpretation of the transaction, it must be understood that the parties intended by the surrender and cancelment of the check, and the execution of a note for the amount, *antedating* the same to the date of the check, that their rights should stand as if the check had not been given. What had been done was undone before payment in fact had been consummated on the check. It would be a strange and unnatural interpretation of the acts of the parties to construe the surrender and cancelment of the check as an intended loan of money, rather than an intention to undo what had been done." [5]

§ 1265. **Payment at a future day.**—The circumstance that the money is to be paid at a future day does not deprive the vendor of his lien. Thus, where for the part of the purchase money unpaid the vendee had given a bond to be paid within twelve months after the vendor's death, the vendor was allowed his lien.[6] So the lien may exist where a part

[5] Honore's Executors v. Bakewell, 6 Mon. B. 67, 72, 43 Am. Dec. 147. In Mims v. Macon & Western R. R. Co., 3 Ga. (Kelly) 333, it is held that the acceptance of a certificate of deposit, if the money is not paid when called for, is not a waiver of the lien. But it is a matter of defense to a bill to enforce a vendor's lien, that the maker of a promissory note, for the price of land, payable at a bank, had funds at the bank, and suffered loss through nonpresentation of the note: Sims v. Commercial Bank, 73 Ala. 48.

[6] Winter v. Lord Anson, 3 Russ. 488. "I do not think," said the Lord Chancellor, "that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge, and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity."

of the purchase money remains unpaid, and its payment, by the agreement of the parties, is made dependent on the contingency of the wife of the vendor surviving him, and asserting her title to dower. In case she dies before her husband, his right to the part of the money withheld to meet her claim in the event of her survival accrues, and he may enforce his lien.[7]

§ 1266. **Independent security.**—But while the taking of the note of the grantee is not of itself a waiver of the lien, still if the vendor takes independent security of any kind, he loses his lien. If he takes as security for the purchase money a bill of exchange drawn by the grantee upon a third person, and the latter accepts it, the bill of exchange becomes an independent security, the taking of which destroys the vendor's lien. The acceptor of the bill becomes the principal debtor, and is primarily liable to the vendor.[8] The taking of personal collateral security is a waiver of the lien.[9]

[7] Redford v. Gibson, 12 Leigh, 332, 348.

[8] Boynton v. Champlin, 42 Ill. 57.

[9] Williams v. Roberts, 5 Ohio, 35; Brown v. Gillman, 1 Mason, 214, s. c. 4 Wheat. 255, 4 L. ed. 564; Stevens v. Rainwater, 4 Mo. App. 292; Ilett v. Collins, 103 Ill. 74; Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90; Akers v. Luse, 56 Iowa, 346; Cresap v. Manor, 63 Tex. 485. See, also, Walker v. Struve, 70 Ala. 167; Spears v. Taylor, 42 So. 1016; Griffin v. Smith, 143 Fed. 865, 75 C. C. A. 73, reversing 82 S. W. 684, 5 Ind. T. 89; Haskell v. Scott, 56 Ind. 504; Sears v. Smith, 2 Mich. 243; Spence v. Palmer, 115 Mo. App. 76, 90 S. W. 749; Vail v. Foster, 4 N. Y. 312. The taking of security from a third person will at least be prima facie evidence of a waiver: Lawson v. Cundiff, 81 Mo. App. 169; Hunt v. Marsh, 80 Mo. 396; Campbell v. Baldwin, 2 Humph. 248; Marshall v. Christmas, 3 Humph. 616, 39 Am. Dec. 199; Faver v. Robinson, 46 Tex. 204; Bennett v. Murphy, 108 N. Y. S. 231, 123 App. Div. 102, affirmed in 88 N. E. 1114. Where the husband purchases the land, but the deed is made to his wife, the taking of his note is not a waiver of the lien: Davis v. Smith, 88 Ala. 596; Moore v. Worthy, 56 Ala. 163; Bakes v. Gilbert, 93 Ind. 70; Davenport v. Murray, 68 Mo. 198; Davis v. Pearson, 44 Miss. 508; Williams v. Crow, 84 Mo. 298; Jackson v. Stanley, 87 Ala. 270, 6 So. 193. but see, *contra*, Andrus v. Coleman, 82 Ill. 26, 25 Am. Rep. 289.

It is immaterial whether the relation of the surety to the note taken by the vendor is that of indorser, joint maker, or guarantor. The lien is waived by the acceptance of the independent security.[1] But in Kentucky, it is held that the substitution of a note of a third person for that of the vendee will not cause a waiver of the lien.[2] The taking of a husband's note for the balance due to the vendor for land conveyed to his wife and partly paid for out of her funds, has been held to be a waiver of the lien.[3] "It is very true that when an individual parts with his land, he should receive

[1] Hummer v. Schott, 21 Md. 307; Yaryan v. Shriner, 26 Ind. 364. That the lien is waived by taking independent security, see Boon v. Murphy, 6 Blackf. 272; Carnes v. Hubbard, 10 Miss. (2 Smedes & M.) 108; Wilson v. Graham, 5 Munf. 297; Schwarz v. Stein, 29 Md. 112; Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669; Campbell v. Henry, 45 Miss. 326; Cannon v. Bonner, 38 Tex. 487; Durette v. Briggs, 47 Mo. 356; Baum v. Grigsby, 21 Cal. 172, 83 Am. Dec. 153; Carrico v. Farmers & Merchants' Nat. Bank, 33 Md. 235; Sears v. Smith, 2 Mich. 243; McGonigal v. Plummer, 30 Md. 422; Dietrich v. Folk, 40 Ohio St. 635; Sanders v. McAffee, 41 Ga. 684; Vail v. Foster, 4 N. Y. 312; Johnson v. Sugg, 21 Miss. (13 Smedes & M.) 346; Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60. And see Porter v. The City of Dubuque, 20 Iowa, 440. Taking a mortgage for purchase money extinguishes the lien: Fields v. Drennen, 22 So. 114, 115 Ala. 558; Blomstrom v. Dux, 51 N. E. 755, 175 Ill. 435; Robbins v. Masteller, 147 Ind. 122, 46 N. E. 330; Nixon v. Knollenberg, 92 Mo. App. 20; Shurtz v. Colvin, 55 Ohio St. 274, 45 N. E. 527; Maison v. Daily, 44 Atl. 839. Cases involving trust deeds; Lee v. Murphy, 119 Cal. 364, 51 Pac. 549; Hunter v. Wood, 43 S. E. 186, 101 Va. 54; Nixon v. Knollenberg, 92 Mo. App. 20; Gardner v. Knight, 124 Ala. 273, 27 So. 298; McKeown v. Collins, 21 So. 103, 38 Fla. 276; Franklin v. Hillsdale Land & Cattle Co., 70 Ill. App. 297, where the mere agreement to accept other property as security and in fact the other property was not delivered, the lien was waived: Shrimsher v. Newton, 3 Ind. 555, 64 S. W. 534, Shelley v. Estes, 83 Mo. App. 310; Bray v. Booker, 8 N. D. 347, 79 N. W. 293.

[2] Tiernan v. Thurman, 14 Mon. B. 277, 281. And see McClure v. Harris, 12 Mon. B. 261; Burrus v. Roulhac, 2 Bush, 39; Jobe v. Chedister, 5 Lea (Tenn.), 346; Stroud v. Pace, 35 Ark. 100; Loomis v. Davenport etc. R. Co., 17 Fed. 301; Acree v. Stone, 142 Ala. 156, 37 So. 934.

[3] Cowl v. Varnum, 37 Ill. 181; Andrus v. Coleman, 82 Ill. 26, 25 Am. Rep. 289; Partridge v. Logan, 3 Mo. App. 509. But see Bakes v. Gilbert, 93 Ind. 70, and Scott v. Edgar, 159 Ind. 38, 63 N. E. 452.

the purchase money—that is sheer justice; and as long as he indicates by his act, for instance, the simply taking the bond or note of the purchaser, that he relies upon the land itself as a means of payment, the law says he shall retain a specific lien upon the property sold, subject, of course, to have it defeated by the intervention of creditors or purchasers without notice. But when he carves out an independent security for himself, in exchange for the land sold, when he creates for himself a distinct and separate fund to which he can look for payment, when he gives an absolute deed for the land, thereby rendering it subject to other claims and the contingency of sale, it does appear that the vendor has no right to complain. The evil, if any, is easily averted by ordinary care, either by taking a mortgage, which, on being recorded, is notice to all the world thereby carrying out the policy of our registration laws, and in many cases preventing third persons from giving credits to the vendee, on the faith and security of the very land sold; or by retaining the title, simply giving a bond for a conveyance, upon the payment of the purchase money. These modes are familiar to everyone, and generally are pursued in those every-day transactions when real property is bought and sold. If the mode and manner of payment are all that are intended by the taking of a note with an indorser upon it, it would seem they would be sufficiently indicated without invoking the liability of a third person, who frequently would feel that his contract was something more than mere form; and, certainly, the simple note or bond of the purchasers would be quite sufficient to set forth the amount, place, and time of payment." [4] Where a doubt remains, it is said that the lien attaches.[5] The parties may agree that the acceptance of a note of a third party shall not waive the lien.[6]

[4] Bradford v. Marvin, 2 Fla. 463, 473, per Mr. Justice Hawkins.

[5] Harris v. Hanks, 25 Ark. 510. See Wilson v. Lyon, 51 Ill. 166; Fenter v. McKinstry, 91 Ill. App. 255.

[6] Lord v. Wilcox, 99 Ind. 491. See Hunt v. Marsh, 80 Mo. 396, to

§ 1266a. Pusuit of remedy at law as waiver.—If the vendor pursues his remedy at law, it is generally held that the implied lien is not thereby waived.[7] The equitable lien remains until there is a payment or some legal equivalent or bar to the recovery. At most, the pursuit of the legal remedy can

the effect that the acceptance of other security than the note of the purchaser is only *prima facie* a waiver of the lien. It is said by Earl, J., in a recent case in New York: "The examination of many authorities shows that the vendor's lien is not now a favorite with courts of equity, and that it has many times been enforced with reluctance and misgivings. Equity judges have found it difficult to find any justifiable basis for it to rest on, and they have differed as to the grounds and reasons for its introduction into the equity jurisprudence of England and of this country. It has been repudiated in some of the states by the courts, and in others it has been abrogated by legislative enactments. It is against the general policy of our law, which looks with disfavor upon secret interests in real estate, and requires, generally, that titles to real estate shall be created by some writings which shall be spread upon the public records for the protection of those who might trust to titles apparently sound, but afflicted with secret infirmities. It generally gives way to a legal interest or to a superior equity, and, as it is a matter of purely equitable cognizance, it should never be enforced when it would be inequitable to do so. Hence, it is never allowed to prevail against one who takes an encumbrance upon the land, or an interest therein, or a conveyance thereof, in good faith, without notice of the lien, and for a valuable consideration parted with before such notice:" Maroney v. Boyle, 141 N. Y. 462, 38 Am. St. Rep. 821. That the tendency of the decisions is to restrict the lien, see Peters v. Tunnell, 43 Minn. 473, 19 Am. St. Rep. 252; Richards v. Learning, 27 Ill. 431, 81 Am. Dec. 239; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Napier v. Jones, 47 Ala. 90; Woodall v. Kelly, 85 Ala. 368, 5 So. 164, 7 Am. St. Rep. 57.

[7] In re Perdue, 2 Nat. Bank. Reg. 183; Chapman v. Lee, 64 Ala. 483; Micon v. Ashurst, 55 Ala. 607; Richardson v. Green, 46 Ark. 267; Graves v. Coutant, 31 N. J. Eq. 763; McAlpine v. Burnett, 19 Tex. 497; Ball v. Hill, 48 Tex. 634; Marshall v. Marshall, 42 S. W. 353; Roberts v. Johnson, 48 Tex. 137; Waldrom v. Zacharie, 54 Tex. 503; Humphrey v. Thorn, 63 Ind. 296; Dibblee v. Mitchell, 15 Ind. 435, 77 Am. Dec. 99; Crowfoot v. Zink, 30 Ind. 446; Nutter v. Fouch, 86 Ind. 451; DuBois v. Hull, 43 Barb. 26; Zwingle v. Wilkinson, 94 Tenn. 246, 28 S. W. 1096; Zeigler v. Valley Coal Co., 150 Mich. 82, 113 N. W. 775, 14 Detroit Leg. N. 603, 13 Am. & Eng. Ann. Cases, 90, and note thereto.

be but a circumstance tending to show a waiver on the part of the vendor of his equitable lien.[8] It has been held that the holder of a vendor's lien, by prosecuting his legal remedy for the purchase price to judgment, and by a sale of the land under execution thereon, waives his lien.[9] The cases so holding are based on the theory that a sale of the land under execution is an act so inconsitsent with a retention of the implied lien as to amount to a waiver thereof.[1]

§ 1267. **Agreement to give security.**—If there be an agreement to give a mortgage as security for the payment of the purchase money, the lien is not waived until the mortgage is executed and delivered.[2] If a bond has been given for title on the payment of the purchase money, and subsequently the vendor executes a deed to the vendee on the latter's promise to give personal security for the purchase money, which promise he fails to keep, the vendor as against him, is entitled to a lien on the land.[3] So, the lien is not affected by a verbal agreement by the grantee to reconvey the land to the grantor in case of his failure to pay the consideration for the conveyance.[4]

§ 1268. **Worthless security.**—The general rule undoubtedly is that the lien is waived by taking the independent security, and if such independent security prove to be worthless, this has no effect upon the waiver. But there are some cases which may be regarded as exceptions to this rule or

[8] Dubois v. Hull, 43 Barb. 26.

[9] Dickason v. Fisher, 37 S. W. 1114, 137 Mo. 342; Hall v. Jones, 21 Md. 439; Nutter v. Fouch, 86 Ind. 451; Outton v. Mitchell, 4 Bibb. 239; Clark v. Stilson, 36 Mich. 136; White v. Downs, 40 Tex. 225; McArthur v. Porter, 1 Ohio, 99.

[1] As to pursuit of remedy at law as a waiver of vendor's lien which arises through a retention of the title by the vendor, see note in 13 Am. & Eng. Ann. Cases page 93.

[2] Jones v. Vantress, 23 Ind. 533.

[3] Dunlap v. Burnett, 5 Smedes & M. (13 Miss.), 702, 45 Am. Dec. 269.

[4] Gallagher v. Mars, 50 Cal. 23.

in conflict with it. If through the fraud of the vendee the vendor accepts worthless security, it is held that his lien is not waived.[5] Where a purchaser asked for an extension of time for the payment of an amount still due, under a contract of purchase, but the vendor refused unless the purchaser would repurchase the land and pay an increased amount, and the purchaser consenting, the vendor executed a deed and took back a mortgage for such increased amount, the pretended resale was held to be a mere cover for usury, and the mortgage was declared void; but the original debt was held not to be merged in the void mortgage, but to be secured by an equitable lien upon the land as a part of the purchase money due upon the original contract.[6] It has been held that the lien is not lost when the purchase money has been secured by an invalid deed of trust.[7] But the debt itself is not invalidated by the fact that the mortgage given to secure it is void.[8]

§ 1269. **Subsequent purchasers.**—A subsequent purchaser in good faith, for value, who has no notice of the lien, takes the land free from the lien.[9] A recital in the deed from the original vendor that a part of the indebtedness is

[5] Crippen v. Heermance, 9 Paige, 211; Skinner v. Purnell, 52 Mo. 96. See Burger v. Hughes, 5 Hun, 180; Dubois v. Hall, 43 Barb. 26; Yeomans v. Bell, 79 Hun, 215, 29 N. Y. S. 502; Himes v. Langley, 85 Ind. 77; Tobey v. McAllister, 9 Wis. 463; Franklin v. Walker, 171 Ill. 405, 49 N. E. 556; Jones v. Rush, 156 Mo. 364, 57 S. W. 118.

[6] Crippen v. Heermance, 9 Paige, 211.

[7] Champlin v. McLeod, 53 Miss. 484. And see Haugh v. Blythe, 20 Ind. 24; Tobey v. McAllister, 9 Wis. 463; Fowler v. Rust, 2 Marsh. A. K. 294; Coit v. Fougera, 36 Barb. 195; Davis v. Cox, 6 Ind. 481; Duke v. Balme, 16 Minn. 306. See, also, Hollis v. Hollis, 4 Baxt. 524. But see, as to lien lost by taking security although worthless, Camden v. Vail, 23 Cal. 633; Hunt v. Waterman, 12 Cal. 301.

[8] Shaver v. B. R. & A. Co., 10 Cal. 396.

[9] Adams v. Buchanan, 49 Mo. 64; Moshier v. Meek, 80 Ill. 79; Thurman v. Stoddard, 63 Ala. 336; Bankhead v. Owen, 60 Ala. 457; Fisk v. Potter, 2 Abb. N. Y. App. 138; Bayley v. Greenleaf, 7 Wheat.

secured by notes does not effect the title of the subsequent purchaser from the original vendee if he buys the land long after the time for the payment of the notes has passed.[1] A representation by a vendor of the nonexistence of the lien may estop him from asserting it against a subsequent purchaser.[2] An assignee in bankruptcy, or an assignee for the benefit of creditors, takes the land subject to the lien.[3] So

46, 5 L. ed. 393; Cator v. Pembroke, 1 Bro. C. C. 301; Short v. Battle, 52 Ala. 456; Woody v. Fislar, 55 Ind. 592; Growning v. Behn, 10 Mon. B. 383; Johnson v. Cawthorn, 1 Dev. & B. Eq. 32, 27 Am. Dec. 250. And see Gann v. Chester, 5 Yerg. 205; Hulett v. Whipple, 58 Barb. 224; Aldridge v. Dunn, 7 Blackf. 249, 41 Am. Dec. 224; Taylor v. Baldwin, 10 Barb. 626; Webb v. Robinson, 14 Ga. 216; New York and Cleveland Gas Coal Co. v. Plumer, 96 Pa. St. 99; Robinson v. Williams, 22 N. Y. 380; Cook v. Banker, 50 N. Y. 655; Moore v. Holcombe, 3 Leigh, 597, 24 Am. Dec. 683; Allen v. Loring, 34 Iowa, 499. See, as to the facts necessary to be set out by a subpurchaser claiming to be such in good faith, without notice, Hooper v. Strahan, 71 Ala. 75. Purchasers, with notice of the nonpayment of the purchase money, take subject to the lien: Thomas v. Bridges, 73 Mo. 530; Graves v. Coutant, 31 N. J. Eq. 763; Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57; Whetsel v. Roberts, 31 Ohio St. 503; Thornton v. Knox, 6 B. Mon. (Ky.) 74; Merrett v. Wells, 18 Ind. 171; Swan v. Benson, 31 Ark. 728; Orrick v. Durham, 79 Mo. 174; Lindenbloom v. Kidston, 2 Alaska, 292; Watson v. Wells, 5 Conn. 468. In Welch v. Farmers' Loan & Trust Co., the court, commenting upon the law of vendor's implied lien said: "But the rule has its limitations. Being a creature of equity, and not of positive law, it must yield to a superior equity. So it cannot prevail against a purchaser from the vendee, for value, without notice of the existence of such a lien; for it must be admitted that one who has not taken the precaution to protect his rights by some visible muniment of it, and allowed another to wear the appearance of ownership and of the power of disposition, stands upon far lower ground in the estimate of equity than one who, in good faith and relying upon the appearances which the original vendor has permitted his vendee to assume, has become a purchaser and has paid the consideration of his purchase."

[1] Robinson v. Owens, 52 S. W. 870, 103 Tenn. 91.

[2] Atkinson v. Lindsey, 39 Ind. 296; Reilly v. Miami Exporting Co., 5 Ohio, 333; Henson v. Westcott, 82 Ill. 224; Burns v. Taylor, 23 Ala. 255; Thompson v. Dawson, 3 Head, 384. See Rowland v. Day, 17 Ala. 681; Young v. Austin, 100 Ill. App. 248; Hoots v. Williams, 22 So. 497, 116 Ala. 372.

[3] In re Perdue, 2 Nat. Bank. Reg.

does a mere volunteer.[4] The purchaser must have paid a new consideration before he is in a position to defeat the lien.[5] And the payment of the consideration must have been made before the receipt of notice.[6] But if he has made part payment before notice, he will be protected *pro tanto*.[7]

§ 1270. **Notice.**—A purchaser has notice of the fact that the purchase money has not been paid when the deed under which his grantor holds contains a recital to this effect.[8] A purchaser will not be excused from notice because he relies upon an abstract of title which does not give the contents of the conveyances constituting the chain of title. By so doing he is guilty of negligence, and no equity in his favor can be raised by the fact that such is the usual custom

183; Bowles v. Rogers, 6 Ves. 95; Pearce v. Foreman, 29 Ark. 563; Brown v. Vanlier, 7 Humph. 239; Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Shirley v. Sugar Refinery, 2 Edw. Ch. 505; Green v. Demoss, 10 Humph. 371; Warren v. Fenn, 28 Barb. 333; Fawell v. Heelis, Amb. 724; Ex parte Peak, 1 Madd. 191; Exchange etc. Bank v. Stone, 80 Ky. 109. See Fisk v. Potter, 2 Abb. N. Y. App. 138; Corlies v. Howland, 26 N. J. Eq. 311. See, as to purchaser under trust deed, to secure pre-existing indebtedness, Bailey v. Tindall, 59 Tex. 540. See Boling v. Howell, 93 Ind. 329.

[4] Tucker v. Hadley, 52 Miss. 414. And see Upshaw v. Hargrove, 6 Smedes & M. 286; Doyle v. Orr, 51 Miss. 229; Taylor v. Alloway, 3 Litt. 216; Davis v. Pearson, 44 Miss. 508; Marsh v. Turner, 4 Mo. 253; Russell v. Watt, 41 Miss. 602, 93 Am. Dec. 270; Gill v. Fugate, 117 Ky. 257, 78 S. W. 188, 25 Ky. Law Rep. 1367.

[5] Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Perkins v. Swank, 43 Miss. 349; Chance v. McWhorter, 26 Ga. 315; Bailey v. Tindall, 59 Tex. 540.

[6] Dresser v. Md. & Iowa Ry. Construction Co., 93 U. S. 92, 23 L. ed. 815; Campbell v. Roach, 45 Ala. 667. See Weaver v. Barden, 49 N. Y. 286.

[7] Craft v. Russell, 67 Ala. 9.

[8] Eichelberger v. Gitt, 104 Pa. St. 64; Daughaday v. Paine, 6 Minn. 443; Willis v. Gay, 48 Tex. 463, 26 Am. Rep. 328; Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587; Thornton v. Knox, 6 Mon. B. 74; Tiernan v. Thurman, 14 Mon. B. 277; Masich v. Shearer, 49 Ala. 226; McAlpine v. Burnett, 23 Tex. 649; McRimmon v. Martin, 14 Tex. 318; Malone's Committee v. Lebus (Ky.) 96 S. W. 519.

in the transfer of real estate.[9] Concerning this practice, Mr. Justice Atwater, in delivering the opinion of the court, observed: "The gross carelessness which here prevails with reference to such transfers has become proverbial, and is the fruitful source of litigation, and should be sanctioned by courts of justice no further than may be absolutely required by the true construction of statutes relating thereto. And instead of encouraging the practice of relying upon abstracts of title, made without reference to the contents of recorded instruments (as the counsel seem to think desirable), it should be regarded with extreme disfavor." [1] Where the deed states that the consideration is yet "to be paid," a purchaser has notice. It is his duty to inquire, and he is affected with all the knowledge he would have obtained had he prosecuted the inquiry.[2] So a subsequent purchaser has notice where the consideration recited is "the sum of seven thousand dollars to her by the party of the second part, paid thus—by giving his three promissory notes, of even date herewith, each for $2,333.33, the first payable two, the second four, and the last six months after date." [3] Any notice which can be said to be either actual or constructive is sufficient to bind the purchaser.[4] But the fact of notice must be satisfactorily established which, of course, cannot be done by loose, vague and uncertain evidence.[5] The record of release of the lien on a

[9] Daughaday v. Paine, 6 Minn. 443.

[1] Daughaday v Paine, 6 Minn. 443.

[2] Cordova v. Hood, 17 Wall. 1, 21 L. ed. 587.

[3] Masich v. Shearer, 49 Ala. 226.

[4] Wilson v. Lyon, 51 Ill. 166; Baum v. Grigsby, 21 Cal. 176, 81 Am. Dec. 153; Tharpe v. Dunlap, 4 Heisk. 674; Harshbarger v. Foreman, 81 Ill. 364; Autrey v. Whitmore, 31 Tex. 623; Ledòs v. Kupfrian, 28 N. J. Eq. 161; Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Tiernan v. Thurman, 14 Mon. B. 277; Parker v. Foy, 43 Miss. 260, 55 Am. Rep. 484; Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60.

[5] Harshbarger v. Foreman, 81 Ill. 364. It is held that the vendor remaining in possession of the land as lessee is not notice to a purchaser that the purchase money has not been paid: White v. Wakefield, 7 Sim. 401. See Eyre v. Sadlier, 14 Irish Ch. 119; s. c. 15 Irish

part of land sold is not notice of the existence of the lien so as to charge parties dealing with the remaining part.[6] But when notice is once brought home to the purchaser, it is clear that the land still remains subject to the lien.[7] The lien may be enforced against the administrator of the purchaser,[8] or his heirs.[9]

§ 1271. **Unrecorded deed.**—The grantee, if he afterward conveys the land to the grantor, will have a lien for the unpaid purchase price. A, who was the owner of a tract of land, conveyed the same by deed to B, who entered into possession but never recorded his deed. B afterward sold the land to A, and gave a bond for title, placed him in possession, but did not execute a deed. C for a valuable consideration, and without notice of the vendor's lien of B, purchased the land from A while he was in possession. C had no notice of B's lien until he had received his deed and paid the greater part of the purchase money to A. The land, it was held, became discharged of the vendor's lien, except as to the part of the purchase money still due from C to A at the time the former received notice of B's lien.[1] The vendor's implied lien does not arise until a default in payment is made by the vendee.[2]

Ch. 1; Cator v. Pembroke, 1 Bro. C. C. 301.

[6] Vansickle v. Watson, 123 S. W. 112.

[7] Gordon v. Bell, 50 Ala. 213; Webb v. Robinson, 14 Ga. 216; Stroud v. Pace, 35 Ark. 100; Ledos v. Kupfrian, 28 N. J. Eq. 161; Sampley v. Watson, 43 Ala. 377; Corlies v. Howland, 26 N. J. Eq. 311; Shall v. Biscoe, 18 Ark. 142; Carr v. Hobbs, 11 Md. 285; Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343; Dodge v. Evans, 43 Miss. 570; Mackreth v. Symmons, 15 Ves. 329; Merritt v. Wells, 18 Ind. 171; Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Bulger v. Holly, 47 Ala. 453; Finnell v. Finnell, 156 Cal. 589, 105 Pac. 740.

[8] Cahoon v. Robinson, 6 Cal. 225.

[9] Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142.

[1] Mitchell v. Dawson, 23 W. Va. 86.

[2] Vance Redwood Lumber Co. v. Durphey, 97 Pac. 702.

§ 1272. **Enforcement of lien.**—The better rule, it seems to us, is, that the vendor may enforce his lien in equity without first attempting to collect his debt by an action at law.[3] Still there is authority for the proposition that before the vendor can resort to equity, he must have exhausted his legal remedy.[4] The heir or devisee of the vendee generally may require the payment of the unpaid purchase money to be made out of the personal property.[5] Where the lien is considered an incident of the debt, it cannot be enforced after the debt is barred by the statute of limitations.[6] To bind subsequent purchasers, they should be made parties to the suit.[7]

[3] Pratt v. Clark, 57 Mo. 189; Stewart v. Caldwell, 54 Mo. 536; Campbell v. Roach, 45 Ala. 667; Sparks v. Hess, 15 Cal. 186; Bradley v. Bosley, 1 Barb. Ch. 125; High v. Batte, 10 Yerg. 186; Dubois v. Hull, 43 Barb. 26; Richardson v. Baker, 5 Marsh. J. J. 323; Owen v. Moore, 14 Ala. 640; Burgess v. Fairbanks, 83 Cal. 215; Mayes v. Hendry, 33 Ark. 240; Clark v. Hunt, 3 J. J. Marsh. (Ky.) 553.

[4] See Gilman v. Brown, 1 Mason, 191; Pratt v. Vanwyck, 6 Gill & J. 495; Bottorf v. Conner, 1 Blackf. 287; Eyler v. Crabbs, 2 Md. 137, 56 Am. Dec. 711; Martin v. Cauble, 72 Ind. 67; Russell v. Todd, 7 Blackf. 239; Richardson v. Stillinger, 12 Gill & J. 477; Ridgeway v. Toram, 2 Md. Ch. 303. And see Ford v. Smith, 1 McAr. 592; Roper v. McCook, 7 Ala. 318.

[5] Warner v. Van Alstyne, 3 Paige, 513; Wright v. Holbrook, 32 N. Y. 587; Sutherland v. Harrison, 86 Ill. 363; Livingston v. Newkirk, 3 Johns. Ch. 312; Lamport v. Beeman, 34 Barb. 239.

[6] Ball v. Hill, 48 Tex. 634; Pitschki v. Anderson, 49 Tex. 1; Trotter v. Erwin, 27 Miss. 772; Hale v. Baker, 60 Tex. 217. But see, on the other hand, Flinn v. Barber, 61 Ala. 530; Stephens v. Shannon, 43 Ark. 464; Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Baltimore & Ohio R. R. Co. v. Trimble, 51 Md. 99; Magruder v. Peter, 11 Gill & J. 217. But see Ware v. Currey, 67 Ala. 274.

[7] Turner v. Phelps, 46 Tex. 251; Davis v. Rankin, 50 Tex. 279; Carter v. Attoway, 46 Tex. 108; Randle v. Boyd, 73 Ala. 282. Subpurchasers of parts of a tract of land are proper parties in a foreclosure suit of the entire tract: Reynolds v. Lawrence, 147 Ala. 216, 40 So. 576, 119 Am. St. Rep. 78. The lien passes with a specific bequest of the claim for the purchase money: Lavender v. Abbott, 30 Ark. 172; Tiernan v. Beam, 2 Ohio, 383, 15 Am. Dec. 557. The decree may allow a time for redemption: Webber v. Mackey, 4 Bradw. (Ill.) 458, but this is not necessary: Gates v. Green, 90 Pac. 189.

Where different tracts of land have been sold at different times, the lien upon each parcel is distinct. One decree should not be entered for the aggregate amount of the lien.[8] Recovery of a judgment upon the note does not destroy the lien.[9] The land should be sufficiently described in the bill.[1] In those States where the lien is assignable, a purchaser with notice who pays off the lien succeeds to the rights of the vendor.[2] A tax sale and certificate operating as a cloud upon the title, and tending to defeat the enforcement of the lien, may be set aside in equity under the bill to enforce the lien.[3] But as a judgment lien does not effect a vendor's lien, the vendor cannot obtain an injunction against a sale under the execution. The sale could not affect him, as his rights after the sale would be the same as they had been before.[4]

[8] Edwards v. Edwards, 5 Heisk. 123. Only so much of the land can be decreed to be sold as will be sufficient to pay the note due, where there are different notes: Burton v. McKinney, 6 Bush, 428; Emison v. Resque, 9 Bush, 24.

[9] Ball v. Hill, 48 Tex. 634; Beck v. Tarrant, 61 Tex. 402; Slaughter v. Owens, 60 Tex. 668; In re Perdue, 2 Nat. Bank. Reg. 183; Palmer v. Harris, 100 Ind. 276. But see Clark v. Stilson, 36 Mich. 482; Dickason v. Eby, 73 Mo. 133. The lien is enforced by a suit in equity: Barker v. Smark, 3 Beav. 64. The lien is barred by such time as would bar a mortgage: Thompson v. Thompson, 3 Lea (Tenn.), 126. As to the parties to a suit after the vendor's or the vendee's death, see McKay v. Green, 3 Johns. Ch. 56; Dayhuff v. Dayhuff, 81 Ill. 499; Knight v. Blanton, 51 Ala. 333; Edwards v. Edwards, 5 Heisk. 123; Thornton v. Neal, 49 Ala. 590; Converse v. Sorely, 39 Tex. 515; Jackson v. Hill, 39 Tex. 493.

[1] Williams v. Roe, 59 Ala. 629; Long v. Pace, 42 Ala. 495. And see generally, as to foreclosure proceedings, Gordon v. Bell, 50 Ala. 213; White v. Downs, 40 Tex. 225; Reed v. Gregory, 46 Miss. 740; Milner v. Ramsey, 48 Ala. 287; Cohen v. Woollard, 2 Tenn. Ch. 686; Leird v. Abernathy, 10 Heisk, 626. See, also, Munford v. Pearce, 70 Ala. 452.

[2] Planters' Bank v. Dodson, 17 Miss. (9 Smedes & M.) 527.

[3] Johnson v. Smith, 70 Ala. 108.

[4] Messmore v. Stephens, 83 Ind. 524. See, as to the rights of one claiming under an execution levied on land subject to a vendor's lien, Bowman v. Faw, 5 Lea (Tenn.), 472.

CHAPTER XXXVI.

ESTOPPEL BY DEED.

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§ 1309. Deed of compositon.
1310. Estoppel limited by intention.
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§ 1273. Estoppel by deed—In general.—The word "estoppel" is applied to those conclusive admissions which the policy of the law will not permit to be denied or controverted. Of the one that we propose to consider, estoppel by deed, it is said: "No person can be allowed to dispute his own solemn deed, which is therefore conclusive against him, and those claiming under him, even as to the facts recited in it. The general rule is that an indenture estops all who are parties to it, while a deed-poll only estops the party who executes it, since it is his sole language and act."[1]

§ 1274. From what doctrine arose.—The doctrine of estoppel by deed arose probably from the solemnity and importance attached to the act which made the instrument a deed, that is, the affixing of a seal. But at the present day the doctrine is not based upon this ground; for where all distinctions between sealed and unsealed instruments have been abolished, the rules of estoppel that at common law applied to sealed instruments, apply now substantially with equal force to conveyances affecting the title to land. We have had occasion to notice this, in treating of the effect of statutes abolishing the distinction between sealed and unsealed instruments.[2] The common-law principles giving security to conveyances of real estate still survive, notwithstanding that the legal effect of a deed, as an operative transfer of title, may no longer depend upon the fact that it is under seal.[3]

[1] Shep. Touch. 53; Wharton's Law Lexicon, tit. Estoppel; Abb. Law Dist., tit. Estoppel.

[2] Vol. I, § 249.

[3] Jones v. Morris, 61 Ala. 518, 524. And see generally on estoppel

§ 1275. **Validity of deed.**—In order that a deed may operate as an estoppel, it is essential that the deed should be valid as a transfer of the grantor's interest.[4] Thus, where

by deed, Stewart v. Metcalf, 68 Ill. 109; Hill v. Den, 54 Cal. 6; Noe v. Splivalo, 54 Cal. 207; Delaney v. Dutcher, 23 Minn. 373; Rankin v. Warner, 2 Lea, 302; Buchanan v. Kimes, 2 Baxt. 275; Tartar v. Hall, 3 Cal. 263; Tewksbury v. Provizzo, 12 Cal. 20; Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593; Gee v. Moore, 14 Cal. 472; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Dodge v. Walley, 22 Cal. 224, 83 Am. Dec. 61; Coles v. Soulsby, 21 Cal. 47; Flandreau v. Downey, 23 Cal. 354; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Tunnell v. Burton, 4 Del. Ch. 382; Wilcoxson v. Osborn, 77 Mo. 621; Cooper v. Watson, 73 Ala. 252; Charleston City Council v. Caulfield, 19 S. C. 201; Hasenritter v. Kirchhoffer, 79 Mo. 239; Haven v. Seeley, 59 Cal. 494; Rutherford v. Stamper, 60 Tex. 447; Cunningham v. Cunningham, 20 S. C. 317; Bixby v. Bent, 59 Cal. 522; Zimler v. San Luis W. Co., 57 Cal. 221; Hannah v. Collins, 94 Ind. 201; Peterson v. Brown, 17 Nev. 172, 45 Am. Rep. 437; Karnes v. Wingate, 94 Ind. 594; McCarty v. St. Paul, Minneapolis etc. Ry. Co., 31 Minn. 278; Dobbins v. Cruger, 108 Ill. 188; Calkins v. Copley, 29 Minn. 471; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Traver v. Baker, 8 Saw. 535, 15 Fed. Rep. 186; Watters v. Connelly, 59 Iowa, 217; Crawford v. Mobile & Girard R. R. Co., 67 Ga. 405; Styles v. Price, 64 How. Pr. 227; McNeil v. Jordan, 28 Kan. 7; Fretelliere v. Hindes, 57 Tex. 392; Chapman v. Miller, 130 Mass. 289; Sherman v. Kane, 86 N. Y. 57; Preston v. Evans, 56 Md. 476; Jones v. Reese, 65 Ala. 134; McDonald v. Lusk, 9 Lea (Tenn.), 654; Reeves v. Vinacke, 1 McCrary C. C. 213; Faulks v. Kamp, 17 Blatchf. 432; Williamson v. Williamson, 71 Me. 442; Smith v. Williams, 44 Mich. 240; De Witt v. Van Schoyk, 35 Hun, 103; Bryan v. Uland, 101 Ind. 477; Williams v. Champion, 39 N. J. Eq. 350; Carson v. New Bellevue Cemetery Co., 104 Pa. St. 575; Perrin v. Perrin, 62 Tex. 477; Randall v. Lower, 98 Ind. 255; Philadelphia v. Ash, 15 Phila. 45; Scott v. Briscoe, 36 La. Ann. 278; Howard v. Massengale, 13 Lea (Tenn.), 577; Utterback v. Phillips, 81 Ky. 62; Root v. Wright, 21 Hun, 344; Esterbrook v. Savage, 21 Hun, 145; Tufts v. Du Bignon, 61 Ga. 322; Real Estate Trust Co. v. Balch, 45 N. Y. Sup. Ct. 528; Dorris v. Smith, 7 Or. 267; Hobson v. Edwards, 57 Miss. 128; Morris v. Daniels, 35 Ohio St. 407; Mull v. Orme, 67 Ind. 95.

[4] Conant v. Newton, 126 Mass. 105; James v. Wilder, 25 Minn. 305; Caffrey v. Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Merriam v. Boston, Clinton etc. R. R. Co., 117 Mass. 241; Shevlin v. Whelan, 41 Wis. 88; Pells v. Webquish, 129 Mass. 469.

the deed of an Indian proprietor to a person not a proprietor is void, the heirs of the grantor are not estopped from setting up title to the land described in such deed.[5] The case just cited is an illustration of the principle well established, that an estoppel does not arise from a deed which is prohibited by statute.[6] The principle of estoppel does not apply to an incomplete deed.[7] Nor does the principle apply where a deed has been obtained by fraud.[8] If the grantee accepts a deed from a parol purchaser on a condition which was not performed, and as a consequence his right ceased, he is not estopped from setting up title against the parol purchaser under a conveyance from the original vendor.[9] If a mortgage is void as contrary to a public statute, the mortgagor may assert its nullity as against a purchaser under it.[1] If a deed is not delivered, there can be no estoppel;[2] nor if the signature of the grantor is secured without his knowledge, that the paper signed is a deed.[3] Where the statute requires that a mortgage to be valid should be executed by both husband and wife, a mortgage executed by the husband alone is inoperative and void, and cannot become valid from the fact that the property subsequently lost its character as a homestead. In an action of foreclosure the husband is not estopped from asserting the invalidity of the mortgage.[4]

[5] Pells v. Webquish, 129 Mass. 469.

[6] Doe dem. Preece v. Howells, 2 Barn. & Adol. 744; Doe dem. Chandler v. Ford, 3 Ad. & E.

[7] Van Dyke v. Van Dyke, 119 Ga. 830, 47 S. E. 192.

[8] Call v. Shewmaker, 24 Ky. L. Rep. 686, 69 S. W. 749, 70 S. W. 834.

[9] McSpadden v. Starrs Mountain Iron Co., 42 S. W. 497.

[1] State v. State Bank, 5 Ind. 353.

[2] Nourse v. Nourse, 116 Mass. 101.

[3] Marden v. Dorthy, 12 App. Div. 188, 42 N. Y. S. 827. See, also, as to defective and inoperative instruments: Parker v. Waycross & F. R. Co., 81 Ga. 387, 8 S. E. 871; Benson v. Files, 70 Ark. 423, 68 S. W. 493; Slattery v. Heilperin, 110 La. 86, 34 So. 139; Thompson v. Cevorier, 70 N. H. 259, 47 Atl. 76; Morgan's Lessee v. Slider, 22 Md. 267; Drake v. Howell, 133 N. C. 162, 45 S. E. 539; Allebach v. Hunsicker, 132 Pa. 349, 19 Atl. 139.

[4] Powell v. Patison, 100 Cal. 236, 34 Pac. 677. An estoppel cannot

§ 1276. **Deed void in part.**—Where a deed is only partially void, the part that is good may work an estoppel.[5] So if a husband and wife join in a conveyance, and the conveyance be void as to the wife, it may still bind the husband by estoppel.[6] But a husband and wife are not estopped from claiming against a deed in which they are not mentioned as grantors, although they have acknowledged it.[7] If a husband, however, executes a mortgage on lands belonging to his wife, describing them in the instrument as his own, he is estopped from denying his ownership.[8] If a widow executes a deed of the property of her deceased husband, to one named as his child and heir, neither she nor her heirs are estopped from denying that the grantor named in the deed

be founded upon a deed that is invalid: Tewksbury v. O'Connell, 21 Cal. 60; Altemus v. Nickell, 115 Ky. 506, 77 S. W. 221; Stone v. Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 45; Heckman v. Stewart, 69 Tex. 255, 5 S. W. 833; Holmes v. Johns, 56 Tex. 41; Atkinson v. Bell, 18 Tex. 474; Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781; Smith v. Ingram, 130 N. C. 100, 61 L.R.A. 878, 40 S. E. 984; Nourse v. Nourse, 116 Mass. 101; Conant v. Newton, 126 Mass. 105; Pells v. Webquish, 129 Mass. 469; Breck v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493; Heyward v. Farmers Min. Co., 42 S. C. 138, 28 L.R.A. 42, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702; Burroughs v. Pacific Guano Co., 81 Ala. 255, 1 So. 212; Harden v. Darwin, 77 Ala. 472; Winsted Sav. Bank etc. Assn. v. Spencer, 26 Conn. 105; Langan v. Sankey, 55 Iowa, 52, 7 N. W. 393; O'Brien v. Bugbee, 46 Kan. 1, 26 Pac. 428.

[5] Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937. If a deed be void for want of a proper description, yet if it has always been treated as valid by the grantor, and he has induced the grantee to erect buildings on the land, his heirs are estopped to deny its validity: Patterson v. Patterson (Tex. Civ. App., Oct. 10, 1894), 27 S. W. Rep. 837.

[6] Chapman v. Abrahams, 61 Ala. 108; Wellborn v. Finley, 7 Jones, 228. And see North v. Henneberry, 44 Wis. 306; Albany Ins. Co. v. Bay, 4 Comst. 9. See, also, Housatonic Bank v. Martin, 1 Met. 294; Germond v. People, 1 Hill, 343; Jackson v. Brinckerhoff, 3 Johns. Cas. 101.

[7] Hall v. Ditto, 11 Ky. Law Rep. 667, 12 S. W. 941.

[8] Holland v. Jones, 48 S. C. 267, 26 S. E. 606.

was her child and heir where there was no controversy over the property granted in the deed.[9]

§ 1277. **Registration of deed.**—The grantor will not be permitted to claim that the purchaser should have placed his deed on record, in order to prevent a wrongful transfer by the grantor subsequently of the same title to another.[1] A executed a deed to C, containing a recital that he had previously conveyed the land to B, and that he had conveyed it to C. Prior to the execution of the deed, B had given a written statement that he had conveyed the land by deed to C, but neither of these two deeds referred to in the recitals was placed on record, nor was there any proof that either existed. The court held that neither A nor B could deny title in C.[2] A person who, after receiving a deed, delivers it to the proper officer for registration, and, several years later, after the death of the grantor and the grantor's grantor, on learning of the officer's neglect, causes it to be recorded, is not estopped from claiming the land in the absence of proof that the heirs had been misled to their damage.[3]

§ 1278. **When truth appears, no estoppel.**—A party is not estopped from showing the truth when the truth appears upon the instrument itself.[4] "The principle is that an estoppel concludes the party from alleging the truth; and, therefore, a man who admits a fact or deed in general terms, either by reciting it in an instrument executed by him, or by acting under it, shall not be received to deny its existence. But when the truth appears by the same deed or record, which

[9] Stone v. Salisbury, 209 Ill. 56, 70 N. E. 605.

[1] Williamson v. Williamson, 71 Me. 442.

[2] Howard v. Massengale, 13 Lea (Tenn.), 577.

[3] Love v. Stone, 56 Miss. 449.

[4] Wheelock v. Henshaw, 19 Pick. 341; Sinclair v. Jackson, 8 Cowen, 543; Cuthbertson v. Irving, 4 Hurl. & N. 742; Pelletreau v. Jackson, 11 Wend. 110, 118; Pargeter v. Harris, 7 Q. B. 708.

would otherwise work the estoppel, then the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth when it appears of record. Lord Coke in his commentary on Littleton, who gives the rule contended for, at the same time makes this exception; and Baron Comyn in his valuable digest confirms both the rule and the exception.[5] Two cases are put by them to exemplify the exception. The first is the case of a fine levied, or concord made upon an original on which a retraxit is entered. The parties are estopped to say when the fine is pleaded, that it was not upon an original (for it shall be intended well levied), yet if it appears by the same record that a retraxit was entered on the original, then the parties are not estopped to say it; for it appears by the record itself. The second is an impropriation to a bishop of a rectory, after the death of the incumbent; and by indenture showing the matter, the bishop demises the rectory for years in the life of the incumbent, and the lease is confirmed by the dean and chapter. The bishop is not estopped by the indenture of demise, for it appears by the same deed that he then had nothing in the rectory." [6]

§ 1279. **Parties bound.**—The general rule is that only parties and privies are bound by an estoppel.[7] "It is an un-

[5] Citing Com. Dig. Estoppel (E. 2).

[6] Sinclair v. Jackson, 8 Cowen, 586. See Saunders v. Merryweather, 3 Hurl. & C. 902; Morton v. Woods, Law R. 4 Q. B. 293.

[7] Sunderlin v. Struthers, 47 Pa. St. 411; Kitzmiller v. Rensselaer, 10 Ohio St. 63; Cottle v. Sydnor, 10 Mo. 763. One who is not a party to a deed cannot urge that the grantee is estopped to deny the operation of a stipulation in the deed when such party has not himself been misled or injured by the stipulation: McKinney v. Lanning, 139 Ind. 170, 38 N. E. Rep. 601. As strangers are not bound they cannot claim that the deed operates as an estoppel. Claflen v. Boston etc. R. Co., 157 Mass. 489, 20 L.R.A. 638, 32 N. E. 659; Manners v. Haverill, 135 Mass. 165; Merrifield v. Parritt, 11 Cush. 590; Buffum v. Hutchinson, 1 Allen, 58; Stackpole v. Robbins, 47 Barb. 212; Walrath v. Redfield, 18 N. Y. 457; Pope v. O'Hara, 48 N. Y. 466; East Alabama R. Co. v.

precedented extension of the doctrine of equitable estoppel to hold that a man is bound to the world to make good what he has said to any one, if others choose to rely upon it. If every man may be held liable not only to parties and privies to his deed, but to all mankind, to make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it." [8] A grantee is not bound by a recital in a deed in favor of a stranger.[9] Where a stranger to a deed introduces it in evi-

Tennessee etc. R. Co., 78 Ala. 274; Hungerford v. Hicks, 39 Conn. 259; Stapp v. Wilkinson, 80 Ala. 47; Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Graves v. Colwell, 90 Ill. 612; Cross v. Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. Rep. 902; Simpson v. Pearson, 31 Ind. 1, 90 Am. Dec. 577; McKinney v. Lanning, 139 Ind. 170, 38 N. E. 601; Hovey v. Woodward, 33 Me. 470; Wilkins v. Dingley, 29 Me. 73; French v. Lord, 69 Me. 537; Wolf v. Hahn, 28 Kan. 588; Cecil v. Negro Rose, 17 Md. 92; Nutwell v. Tongue, 22 Md. 419; Gorton v. Roach, 46 Mich. 294, 2 N. W. 422; Bradley v. Missouri Pac. R. Co., 91 Mo. 493, 4 S. W. 427; Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206; Robbins v. McMillan, 26 Miss. 434; Griggs v. Smith, 12 N. J. L. 22; Osborne v. Tunis, 25 N. J. L. 633; Griffin v. Richardson, 33 N. C. 439; Brettian v. Daniels, 94 N. C. 781; Ketzmiller v. Van Rensselaer, 10 Ohio St. 63; Allen v. Allen, 45 Pa. St. 468; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Sunderlin v. Struthers, 47 Pa. St. 411; Reeves v. Brayton, 36 S. C. 384, 15 S. E. 658; Townes v. Augusta, 52 S. C. 396, 29 S. E. 851; Bingham v. Walla Walla, 3 Wash. Ty. 68, 13 Pac. 408; McCulloch v. Dashiell, 78 Va. 634; Rogers v. Donnellan, 11 Utah, 108, 39 Pac. 494.

[8] Mr. Justice Strong, in the concurring opinion rendered by him in Sunderlin v. Struthers, 47 Pa. St. 411, 423. See, also, Ray v. Gardner, 82 N. C. 146; Griffin v. Richardson, 11 Ired. 439.

[9] Schuhman v. Garratt, 16 Cal. 100. A grantor is estopped by a clause in a deed conveying a specified interest in land with a covenant of warranty to deny that the deed conveyed such interest: Logan v. Eaton, 66 N. H. 575, 31 Atl. Rep. 13. Where a married woman represents that she is a widow and executes a deed in the capacity of a single woman for a valuable consideration, and, after the death of her husband, conveys the land, without consideration, to her daughter, who has actual notice of the prior deed, the daughter is estopped, and cannot assert that her mother was a widow at the time of the execution of the prior deed: Ramboz v. Stowell, 103 Cal. 588.

dence for the purpose of establishing, as against a subsequent grantee, an admission by the parties to the deed, the grantee is not estopped from showing that the provision upon which reliance is placed was inserted by mistake.[1] A conveyed land with full covenants to B, who subsequently ceded it to the government of the United States, and A purchased the land from the government. After B had ceded the land to the government, he executed a deed of the land to C. The latter, it was decided, could not set up an estoppel against A by reason of the covenants, nor did his subsequently acquired title inure to the benefit of C. By the cession to the government the covenants became extinguished.[2] Where a clerk of a board of supervisors has assigned a tax certificate without the board's authority, and an estoppel rests upon the county against objecting to the assignment, or the deed subsequently made, the owner of the land which had been sold for taxes cannot take advantage of the original defect of authority.[3]

§ 1279a. **Grantee may deny grantor's title.**—A grantee is not estopped to deny the title by his acceptance of a deed.[4]

[1] Pope v. O'Hara, 48 N. Y. 446.

[2] Goodel v. Bennett, 22 Wis. 565. See Avery v. Judd, 21 Wis. 262.

[3] Woodman v. Clapp, 21 Wis. 350. A recital will bind by estoppel the grantor and his privies: Stoutimore v. Clark, 70 Mo. 471; Kinsman v. Loomis, 11 Ohio, 475; Usina v. Wilder, 58 Ga. 178; Pinckard v. Milmine, 76 Ill. 453; Byrne v. Eckstein, 2 Cal. 580; Hasenritter v. Morehouse, 22 Ill. 603; Simson v. Kirchhoffer, 79 Mo. 239; Rangely v. Spring, 28 Me. 127; Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761; Jackson v. Parkhurst, 9 Wend. 209; West v. Pine, 4 Wash. 691; Chautauqua Co. Bank v. Risley, 4 Denio, 480; Stronghill v. Buck, 14 Q. B. 781; Doe v. Porter, 3 Ark. 18, 36 Am. Dec. 448.

[4] Moore v. Smead, 89 Wis. 558, 62 N. W. 426; Wenzel v. Schultz, 100 Cal. 250, 34 Pac. 696; Maslen v. Thomas, 8 Gill 18; Moore v. Farrow, 3 A. K. Marsh. 41; Winlock v. Hardy, 4 Litt. 272; Blair v. Smith, 16 Mo. 273; Cutter v. Waddingham, 33 Mo. 269; Hill v. Hill, 4 Barb. 419; Bigelow v. Finch, 11 Barb. 498; Collins v. Boyd, 5 Dana, 316; Merryman v. Bourne, 9 Wall. 592, 19 L. ed. 683.

"There is no estoppel" says Mr. Justice Bronson, "where the occupant is not under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor and he does him no wrong when he treats him as an entire stranger to the title." [5] The grantee may deny the existence of any title in his grantor, as the transaction is closed when the deed is executed and delivered. The grantee is under no obligation to maintain the validity of the title but holds it for himself alone. There is in the language of Mr. Justice Wright "no relation existing between the grantee in fee, and his grantor as will raise even an implied obligation on the part of the former against a denial of the title and estate of the latter." [6] A grantee by accepting a deed confirming a prior deed is not estopped from asserting title founded upon the prior deed.[7] A vendee may purchase an outstanding title adverse to that of his vendor and set up such title to defeat him.[8] The grantee is, as a general proposition not estopped from denying his grantor's title, and he can be estopped only where there is an obligation on his part to give back the possession in some event or on the happening of some contingency.[9]

§ 1280. Representative capacity.—A deed can bind a party by way of estoppel only in the capacity in which he executes it. One who executes a deed as the attorney in fact for another is not precluded from subsequently setting

[5] Osterhout v. Shoemaker, 3 Hill, 518.

[6] Sparrow v. Kingman, 1 Comst. 253. See, also, Barker v. Salmon, 2 Met. 32; Averill v. Wilson, 4 Barb. 180.

[7] Tully v. Tully, 137 Cal. 60, 69 Pac. 700; Wenzel v. Schultz, 100 Cal. 250, 34 Pac. 696; Robinson v. Thornton, 100 Cal. 250, 34 Pac. 696.

[8] Huth v. Carondelet Marine Ry. & Dock Co., 56 Mo. 202; Macklot v. Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

[9] Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 401.

up a title to the land, which had been acquired by him prior to the execution of the deed from the person for whom he acted as attorney in fact.[1] Prior to a sale by an administratrix she agreed verbally with one who became the purchaser, that if a certain sum was bid for the land she would waive her right of dower, and in accordance with this agreement the premises were bid off. She executed a deed to the purchaser in the ordinary form, with a covenant against her own acts. No estoppel was held to exist, as the deed having been executed by her in a representative character, the covenant against her own acts was confined to those relating to her representative capacity, and did not interfere with the assertion of her individual rights.[2] It is held that where a guardian of a person *non compos mentis* sells real estate belonging to his ward under permission of the court, and in the deeds covenants that he is duly authorized to sell, he is estopped by the covenant from asserting a claim in his own right to any portion of the land.[3] But it is held that an executor is not estopped by the recital in his deed that he is such executor.[4] But a person who executes a lease to a body claiming to be a corporation, cannot deny its corporate existence for the purpose of defeating the instrument.[5] But if the executors of a will, in violation of its provisions, transfer an interest in land to a third person, and use the proceeds

[1] Smith v. Penny, 44 Cal. 161.

[2] Wright v. De Groff, 14 Mich. 164. And see Gouldsmith v. Coleman, 57 Ga. 425; Doe d. Hornby v. Glenn, 1 Ad. & E. 49.

[3] Heard v. Hall, 16 Pick. 457. And see Poor v. Robinson, 10 Mass. 131.

[4] Larco v. Casaneuava, 30 Cal. 560. Where, on the strength of the signature and acknowledgment of a deed of trust by a married woman, a person advances money on the land, she cannot contend, as against such person, that her husband deceived her into believing that a tract of land other than that described was embraced by the deed: Paxton v. Marshall, 18 Fed. Rep. 361. As to the estoppel of a married woman in claiming an after-acquired interest, see Edwards v. Davenport, 20 Fed. Rep. 756.

[5] Whitney v. Robinson, 53 Wis. 309.

obtained from such transfer for the benefit of the estate, they cannot as devisees claim that the conveyance was invalid, and the estoppel applies also to their creditors.[6] An executor who, by virtue of a power in the will, executes a deed purporting to convey the title of his testator at the time of his death is estopped from claiming an interest in the land conveyed as heir to the deceased.[7] If, however, an administrator mistakenly believes that certain land is the property of the decedent's estate, when in fact he is one of the owners, and under such belief sells the land to one who knows all the facts, but has also a mistaken conception of the law, he is not estopped from claiming subsequently an interest in the land.[8] Where a will authorized the widow to appoint an assistant to help her in the performance of the duties of executrix, and she accordingly appointed such assistant who applied for an order for the sale of the land to enable the debts to be paid, and she joined both in the execution of the deed and in reporting it for confirmation, she is estopped from claiming as against her grantees that all the land was sold.[9] An agent will be estopped from asserting an outstanding interest where he signs a deed conveying the property of his principal.[1]

§ 1280a. **Sale in a representative capacity void.**—If a person undertakes in a representative capacity to sell and convey the entire estate in a tract of land, although the sale

[6] Arlington State Bank v. Paulsen, 59 Neb. 94, 80 N. W. 263, reversing 57 Neb. 517, 78 N. W. 303.

[7] Poor v. Robinson, 10 Mass. 131.

[8] Gjerstadengen v. Van Duzen, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679.

[9] Sims v. Gay, 109 Ind. 501, 9 N. E. 120.

[1] American Freehold Land Mortg. Co. v. Walker, 119 Ga. 341, 46 S. E. 426. See, also, as to estoppel of persons acting in representative capacity: Johnson v. Thomason, 120 Ga. 531, 48 S. E. 137; Benton v. Sentell, 50 La. Ann. 869, 24 So. 297; Battery Park Band v. Western Carolina Bank, 138 N. C. 467, 50 S. E. 848; Wells v. Steckelberg, 52 Neb. 597, 72 N. W. 865, 66 Am. St. Rep. 529.

and the deed made to convey it into effect may be void, he is estopped from setting up an estate in his own right against the purchaser.[2] A grantor may by his recitals estop himself from asserting that he had no authority to convey the fee.[3] "If a deed" it is said, "bears on its face evidence that the grantors intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantors and those claiming under them in respect to the estate thus described, as if a formal covenant to that effect had been inserted."[4] Where a member of a partnership who was the executor of a will procured the execution of a mortgage by the partnership to a third person, the executor holding claims against such third person, he, the executor, it is held, cannot impeach the validity of the mortgage.[5] An executor conveying land of his testator will be estopped from claiming the land as heir.[6] If a person asserts a title based upon proceedings in bankruptcy, he cannot set up to defeat the title of another that when the adjudication against him was made, the bankrupt possessed no title.[7]

§ 1281. **Estate bound.**—A grantor whose covenants are confined to an estate acquired under certain tax deeds is not estopped from setting up another title in himself or from denying the validity of the tax sale.[8] A grantee is not

[2] Wells v. Steckelberg, 52 Neb. 597, 72 N. W. 865, 66 Am. St. Rep. 529.

[3] Mankato v. Willard, 13 Minn. 1, 97 Am. Dec. 208.

[4] Van Renssalaer v. Kearney, 11 How. (U. S.) 297.

[5] Masonic Sav. Bank v. Ronald's Ex'r, 1 Ky. Law Rep. (abstract) 273.

[6] Poor v. Robinson, 10 Mass. 131.

[7] Ketchum v. Schicketanz, 73 Ind. 137.

[8] Sanford v. Sanford, 135 Mass.

estopped from denying his grantor's title when the only title asserted is the precise title obtained from the grantor, or when both claim from a common source in which the title is identical.[9] Where two persons, representing that they are the sole owners of a piece of land and that it is free from encumbrances, convey it to another, who believes the representation, if one of the grantors afterward acquires from his sister an outstanding title which he knew existed at the time of the representation, he is estopped from asserting that after-acquired title against the purchaser.[1] The estoppel is limited to the land or interest conveyed.[2] Parties are bound by the recitals that are pertinent to the subject matter of the deed.[3]

314. See Erwin v. Morris, 26 Kan. 664.

[9] Wilcoxson v. Osborn, 77 Mo. 621.

[1] Karnes v. Wingate, 94 Ind. 594. See as to enforcement of judgment obtained before execution of warranty deed, Dobbins v. Cruger, 108 Ill. 188. In an action of ejectment, a defendant who alleges that he executed a deed under which plaintiff claims without consideration, for the purpose of defrauding creditors, and that the deed was accepted by plaintiff with this knowledge, and that he promised to reconvey to the defendant, who had continuously retained the possession, does not state a defense: Peterson v. Brown, 17 Nev. 172, 45 Am. Rep. 437. Where a receiver's sale is made under order of court in general terms, a purchaser may dispute the validity of a mortgage then existing: Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548. But a deed "subject to all liens and encumbrances of record" estops the grantee from disputing the validity of a recorded mortgage: Styles v. Price, 64 How. Pr. 227. But where the deed is not subject to the mortgage, the deed containing merely the covenant that the premises "are free from all encumbrances except a mortgage to a certain person," the grantee is not estopped from denying the validity of the mortgage: Calkins v. Copley, 29 Minn. 471. And see Watters v. Connelly, 59 Iowa, 217. A mortgagor cannot deny his title as recited in the mortgage: Mitchell v. Kinnard (Ky., Jan. 30, 1895), 29 S. W. Rep. 309.

[2] Kent v. Watson, 22 W. Va. 561; Wheeler v. Aycock, 109 Ala. 146, 19 So. 497; Jackson v. Wright, 14 Johns. 193; Gill v. Grand Tower Min. Co., 92 Ill. 249; Simanek v. Nemetz, 120 Wis. 42, 97 N. W. 508.

[3] Libby v. Ralston, 2 Kan. App. 125, 43 Pac. 294; Taylor v. Riggs, 8 Kan. App. 323; Sinclair v. Jackson, 8 Cow. 543; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Robbins v. McMillan, 26 Miss. 434; Graham v. Meek, 1 Or. 325.

The grantor is bound.[4] And so is the grantee, when he founds his rights on the deed, but he is not where he does not do so.[5] The recital to operate as an estoppel must be certain and material,[6] and while it may be evidence, it is not conclusive in a collateral action not founded on the deed.[7]

§ 1281a. Subsequently acquired title.—If a person who is not the owner of land, or, who has a defective title, sells it with terms importing warranty, any title which he subsequently acquires will, by way of estoppel, inure to the benefit of the grantee.[8] In such a case, to allow the grantor

[4] Newell v. Newell, 34 Miss. 385; McCleskey v. Leadbetter, 1 Ga. 551; Clamorgan v. Greene, 32 Mo. 285; Jackson v. Parkhurst, 9 Wend. 209; Smith v. Burnham, 9 Johns. 306; Hagensick v. Castor, 53 Neb. 495, 73 N. W. 932.

[5] Orthwein v. Thomas, 127 Ill. 554, 4 L.R.A. 434, 13 N. E. 564, 21 N. E. 430, 11 Am. St. Rep. 159; Pinckard v. Milmine, 76 Ill. 453; Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462; Byrne v. Morehouse, 22 Ill. 603; Despain v. Wagner, 163 Ill. 598, 45 N. E. 129; Monmouth Second National Bank v. Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 606; Scott v. Douglass, 7 Ohio, 227; Judd v. Seekins, 62 N. Y. 266; Thrower v. Wood, 53 Ga. 458; Gonzales v. Batts, 20 Tex. Civ. App. 421, 50 S. W. 403; Kimbro v. Hamilton, 28 Tex. 560; Fisk v. Flores, 43 Tex. 340; Flanary v. Kane, 102 Va. 547; Sonoma County Water Co. v. Lynch, 50 Cal. 503.

[6] Zimmer v. San Luis Water Co., 57 Cal. 221; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Hays v. Askew, 50 N. C. 63; Hubbard v. Norton, 10 Conn. 422; Linney v. Woods, 66 Tex. 22, 17 S. W. 244; Comings v. Wellman, 14 N. H. 287; Walker v. Sioux City etc. Town Lot Co., 65 Iowa, 563, 22 N. W. 676; Claflin v. Boston etc. R. Co., 157 Mass. 489, 20 L.R.A. 638, 32 N. E. 659; Reed v. McCourt, 41 N. Y. 435; Muhlenberg v. Druckenmiller, 103 Pa. St. 631; Stillman v. Barney, 4 Vt. 187.

[7] Claflin v. Boston etc. R. Co., 157 Mass. 489, 20 L.R.A. 638, 32 N. E. 659; Stephenson v. Martin, 68 Tex. 483, 3 S. W. 89; Edmonston v. Edmonston, 13 Hun (N. Y.) 133; King v. Mead, 60 Kan. 539, 57 Pac. 113.

[8] Kellogg v. Wood, 4 Paige, 478; Jackson v. Matsdorf, 11 Johns. 91, 6 Am. Dec. 355; Vanderheyden v. Crandall, 2 Den. 9; Utica Bank v. Mesereau, 3 Barb. Ch. 528; Jackson v. Hoffman, 9 Cow. 271; Jackson v. Bull, 1 Johns. Cas. 81; Jackson v. Wright, 14 Johns. 193; Jackson v. Stevens, 13 Johns. 316; Jackson v. Matsdorf, 11 Johns. 91, 6 Am. Dec. 355; Mickels v. Townsend, 18 N. Y. 575; House v. McCormick, 57 N. Y. 310; Fox v. Fee, 24 N. Y. App. Div. 314, 49 N. Y. S. 292; Doyle v. Peer-

to set up a subsequently acquired title, would be to allow him to deny a fact that he has affirmed in his deed, upon the faith of which affirmation the grantee has parted with a valu-

less Petroleum Co., 44 Barb. 239; Lacrustrine Fertilizer Co. v. Lake Guano etc. Fertilizer Co., 19 Hun, 47; Kent v. Harcourt, 33 Barb. 491; Quivey v. Baker, 37 Cal. 465; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112; Paton v. Browne, 19 U. C. Q. B. 337; Ryder v. Sisson, 7 R. I. 341; Harvey v. Harvey, 13 R. I. 598; Layson v. Cooper, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545; Myers v. Snyder, 96 Iowa, 107, 64 N. W. 771; English v. McCreary, 157 Ala. 487, 48 So. 113; Stewart v. Anderson, 10 Ala. 504; Johnson v. Collins, 12 Ala. 322; Blakeslee v. Mobile L. Ins. Co., 57 Ala. 205; Wheeler v. Aycock, 109 Ala. 146, 19 So. 497; Tupy v. Kocourek, 66 Ark. 433, 51 S. W. 69; Land Co. v. Mill etc., 84 Ark. 1, 103 S. W. 609; Broadway v. Sidway, 84 Ark. 527, 107 S. W. 163; Fox v. Lumber Co., 85 Ark. 497, 108 S. W. 1137; Hoyt v. Dimon, 5 Day, 479; Dudley v. Cadwell, 19 Conn. 218; Doe v. Dowdall, 3 Houst. 369, 11 Am. Rep. 757; Knox v. Spratt, 19 Fla. 817; O'Bannon v. Paremour, 24 Ga. 489; Linsey v. Ramsey, 22 Ga. 627; Way v. Arnold, 18 Ga. 181; Goodson v. Beacham, 24 Ga. 150; Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462; Frink v. Darst, 14 Ill. 304, 58 Am. Dec. 575; Bennett v. Waller, 23 Ill. 97; Jones v. King, 25 Ill. 383; Gochenour v. Mowry, 33 Ill. 331; Hitchcock v. Fortier, 65 Ill. 239; Grand Tower Min. etc., Co. v. Gill, 111 Ill. 541; Hull v. Glover, 126 Ill. 122, 18 N. E. 198; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332; Whitson v. Grosvenor, 170 Ill. 271, 48 N. E. 1018; Jones v. Jones, 213 Ill. 228, 72 N. E. 695; Bradford v. Russell, 79 Ind. 64; Johnson v. Bedwell, 15 Ind. App. 236, 43 N. E. 246; Locke v. White, 89 Ind. 492; Karnes v. Wingate, 94 Ind. 594; Neely v. Boyce, 128 Ind. 1, 27 N. E. 169; Thalls v. Smith, 139 Ind. 496, 39 N. E. 154; Frain v. Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Glendenning v. Oil Co., 162 Ind. 642, 70 N. E. 976; Warburton v. Matox, Morr. 367; Childs v. McChesney, 20 Iowa, 431, 89 Am. Dec. 545; Van Orman v. McGregor, 23 Iowa, 300; Nicodemus v. Young, 90 Iowa, 423, 57 N. W. 906; Whitley v. Johnson, 135 Iowa, 620, 113 N. W. 550; Letson v. Roach, 5 Kan. App. 57, 47 Pac. 321; Scoffins v. Grandstaff, 12 Kan. 467; Armstrong v. Portsmouth Bldg., Co., 57 Kan. 62, 45 Pac. 67; McKenzie v. Lexington, 4 Dana, 129; Hall v. Edrington, 9 Dana, 364; McIlvain v. Porter, 7 S. W. 309, 8 S. W. 705, 9 Ky. L. Rep. 899; Massie v. Sebastian, 4 Bibb, 433; Aldridge v. Kincaid, 2 Litt. 390; Logan v. Steele, 4 T. B. Mon. 430, 7 T. B. Mon. 101; Morrison v. Caldwell, 5 T. B. Mon. 426, 17 Am. Dec. 84; Smith v. Mahan, 7 T. B. Mon. 228; Hutcherson v. Coleman, 2 J. J. Marsh. 244; Griffith v. Dicken, 4 Dana, 561; Fitzhugh v. Tyler, 9 B. Mon. 559; Dickerson v. Talbot,

able consideration. While it is sometimes said that this estoppel is odious and is not to be favored, it is, in fact, based upon the highest principles of morality and if it prevents

14 B. Mon. 60; Nunnally v. White, 3 Metc. 584; Churchill v. Ferrill, 1 Bush, 54; Carpenter v. Carpenter, 8 Bush, 283; Bohon v. Bohon, 78 Ky. 408; Perkins v. Coleman, 90 Ky. 611, 14 S. W. 640, 12 Ky. L. Rep. 501; Altemus v. Nickell, 115 Ky. 506, 74 S. W. 221, 245, 24 Ky. L. Rep. 2401, 2416; Zunts v. Courcelle, 16 La. Ann. 96; Rapp v. Lowry, 30 La. Ann. 1272; Jacobs v. Yale, 39 La. Ann. 359, 1 So. 822; Benton v. Sentell, 50 La. Ann. 869, 24 So. 297; New Orleans v. Riddell, 113 La. 1051, 37 So. 966; Harding v. Springer, 14 Me. 407, 3 Am. Dec. 61; Allen v. Sayward, 5 Me. 227, 17 Am. Dec. 221; Webber v. Webber, 6 Me. 127; Fairbanks v. Williamson, 7 Me. 96; Lawry v. Williams, 13 Me. 281; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Gardiner v. Gerrish, 23 Me. 46; Pike v. Galvin, 29 Me. 183; Crocker v. Pierce, 31 Me. 177; Kelly v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Read v. Fogg, 60 Me. 479; Bachelder v. Lovely, 69 Me. 33; Powers v. Patten, 71 Me. 583; Somes v. Skinner, 3 Pick. 52; Bates v. Norcross, 17 Pick. 14, 28 Am. Dec. 271; White v. Patten, 24 Pick. 324; Perry v. Kline, 12 Cush. 118; Cole v. Raymond, 9 Gray, 217; Lincoln v. Emerson, 108 Mass. 87; Russ v. Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Knight v. Thayer, 125 Mass. 25; Huzzey v. Heffernan, 143 Mass. 232, 9 N. E. 570; Ayer v. Philadelphia etc. Face Brick Co., 159 Mass. 84, 34 N. E. 177; Shotwell v. Harrison, 22 Mich. 410; Lee v. Clary, 38 Mich. 223; Smith v. Williams, 44 Mich. 240, 6 N. W. 662; Clark v. Daniels, 77 Mich. 26, 43 N. W. 854; Gray v. Franks, 86 Mich. 382, 49 N. W. 130; Pendill v. Marquette County Agricultural Soc., 95 Mich. 491, 55 N. W. 384; Morris v. Jansen, 99 Mich. 436, 58 N. W. 365; Duffy v. White, 115 Mich. 264, 73 N. W. 363; Dye v. Thompson, 126 Mich. 597, 85 N. W. 1113; Rooney v. Koenig, 80 Minn. 483, 83 N. W. 399; Est. Co. v. Bradley, 97 Minn. 161, 106 N. W. 110; Fletcher v. Wilson, Sm. & M. Ch. 376; Wightman v. Doe, 24 Miss. 675; Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270; Kaiser v. Earhart, 64 Miss. 492, 1 So. 635; Andrews v. Anderson (1894) 16 So. 346; Dodd v. Williams, 3 Mo. App. 278; Norfleet v. Russell, 64 Mo. 176; Ivy v. Yancy, 129 Mo. 501, 31 S. W. 937; Fordyce v. Rapp, 131 Mo. 354, 33 S. W. 57; Johnson v. Johnson, 170 Mo. 34, 59 L.R.A. 748, 70 S. W. 241; Hagensick v. Castor, 53 Nebr. 495, 73 N. W. 932; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Ward v. Willard, 13 N. H. 389; Chamberlain v. Meeder, 16 N. H. 381; Morrison v. Underwood, 20 N. H. 369; Jewell v. Porter, 31 N. H. 34; Kimball v. Schoff, 40 N. H. 190; Hayes v. Tabor, 41 N. H. 521; Fletcher v. Chamberlain, 61 N. H. 438; Decker v. Caskey, 3 N. J. Eq. 446; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Gough

the telling of the truth, or the assertion of a subsequent right, it has this effect only where its assertion would enable the grantor or his privies, to declare that a previous statement

v Bell, 21 N. J. L. 156; More v. Rake, 26 N. J. L. 574; Ross v. Adams, 28 N. J. L. 160; Den v. McKinnie, 6 N. C. 67; Fortescue v. Satterwaite, 23 N. C. 566; Hassell v. Walker, 50 N. C. 270; Wellborn v. Finley, 52 N. C. 228; Jones v. Kingsey, 55 N. C. 463; Benick v. Bowman, 56 N. C. 314; Farmers' Bank v. Glenn, 68 N. C. 35; Bell v. Adams, 81 N. C. 118; Foster v. Hackett, 112 N. C. 546, 17 S. E. 426; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655, 130 N. C. 482, 41 S. E. 877; Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909; Buchanan v. Harrington, 141 N. C. 39, 53 S. E. 478; Walker v. Taylor, 144 N. C. 175, 56 S. E. 877; Bond v. Swearingen, 1 Ohio, 395; Allen v. Parish, 3 Ohio, 107; Jackson v. Williams, 10 Ohio, 69; Tremper v. Barton, 18 Ohio, 418; Philly v. Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Broadwell v. Phillips, 30 Ohio St. 255; Taggert v. Risley, 3 Oreg. 306; 4 Oreg. 235; Hayes v. Leonard, 10 Pa. Co. Ct. 648; McWilliams v. Nisley, 2 Serg. & R. 507, 7 Am. Dec. 654; Ewing v. Desilver, 8 Serg. & R. 92; Brown v McCormick, 6 Watts, 60, 31 Am. Dec. 450; Wood v. Jones, 7 Pa. St. 478; Skinner v. Starner, 24 Pa. St. 123; Washabaugh v. Entriken, 34 Pa. St. 74; Easton's Appeal, 47 Pa. St. 255; George Brandon, 214 Pa. 623, 64 Atl. 371; McCusker v. McEvey, 9 R. I. 528, 11 Am. Rep. 295; Bradford v. Burgess, 20 R. I. 290, 38 Atl. 975; Hodgess v. Goodspeed, 20 R. I. 537, 40 Atl. 373; Lamer v. Simpson, 1 Rich. Eq. 71, 42 Am. Dec. 345; Davis v. Keller, 5 Rich. Eq. 434; Craig v. Reeder, 3 McCord, 411; Robertson v. Sharpton, 17 S. C. 592; Wingo v. Parker, 19 S. C. 9; Gaffney v. Peeler, 21 S. C. 55; Johnson v. Branch, 9 S. D. 116, 68 N. W. 173, 62 Am. St. Rep. 857; Henderson v. Overton, 2 Yerg. 394, 24 Am. Dec. 492; Jarnigan v. Mairs, 1 Humphr. 473; Gookin v. Graham, 5 Humphr. 480; Dunbar v. McFall, 9 Humph. 505; Irvine v. Muse, 10 Heisk. 477; Coal Creek Mining etc. Co. v. Ross, 12 Lea, 1; Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67; Jenkins v. Adcock, 5 Tex. Civ. App. 466, 27 S. W. 21; Scates v. Fohn (Civ. App. 1900) 59 S. W. 837; Morris v. Housley (Civ. App. 1896) 34 S. W. 659; Burkitt v. Twyman (Civ. App. 1896) 35 S. W. 421; Mays v. Lewis, 4 Tex. 38; Gould v. West, 32 Tex. 338; Ackerman v. Smiley, 37 Tex. 211; Harrison v. Boring, 44 Tex. 255; Rutherford v. Stanford, 60 Tex. 447; Satterwhite v. Rosser, 61 Tex. 166; Roninson v. Douthit, 64 Tex. 101; Lindsay v. Freeman, 83 Tex. 259, 18 S. W. 727; Stone v. Sledge, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; Logue v. Atkeson, 35 Tex. Civ. App. 303, 80 S. W. 137; Lowry v. Carter, 46 Tex. Civ. App. 488, 102 S. W. 930; Middlebery College v. Cheney, 1 Vt. 336; Pope v. Henry, 24 Vt. 560; Smith v. Hall, 28 Vt. 364; Cross v. Martin, 46 Vt. 14; Prouty v.

made by the grantor was untrue. Where the deed either expressly or impliedly recites that the grantor is seised of a particular estate, purported to be conveyed by the deed, upon the faith of which the sale is made, he is estopped from setting up an after-acquired title.[9] If a person having no title, mortgages land, a subsequently acquired interest will inure to the benefit of the mortgagee.[1] Where a statute provides that conveyances of land in the adverse possession of another are void, a conveyance with warranty of a tract of land, to a part of which the grantor had no title, which part was held adversely

Mather, 49 Vt. 415; McElroy v. McLeay, 71 Vt. 396, 45 Atl. 898; Coolidge v. Ayers, 76 Vt. 405, 57 Atl. 970; Wynn v. Harman, 5 Gratt. 157; Burtners v. Keran, 24 Gratt. 42; Raines v. Walker, 77 Va. 92; Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; Nye v. Lovett, 92 Va. 710, 74 S. E. 345; Townsend v. Outten, 95 Va. 536, 28 S. E. 958; Flannary v. Kane, 102 Va. 547, 46 S. E. 312, 681; Brazee v. Schofield, 2 Wash. Terr. 209, 3 Pac. 265; Bank v. Lewis, 37 Wash. 344, 79 Pac. 932; Mitchell v. Petty, 2 W. Va. 470, 98 Am. Dec. 777; Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 St. Rep. 854; Summerfield v. White, 54 W. Va. 311, 46 S. E. 154; Clark v. Lambert, 55 W. Va. 512, 47 S. E. 312; Yock v. Mann, 57 W. Va. 187, 49 S. E. 1019; Wiesner v. Zuan, 39 Wis. 188; Shepherd v. Kahle (1903) 97 N. W. 506; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434; McGill v. Jordan, 16 Fed. Cas. No. 8795a; Lamb v. Carter, 15 Fed. Cas. No. 8013, 1 Sawy. 212; Fields v. Squires, 9 Fed. Cas. No. 4776, Deady, 366; Corcoran v. Brown, 6 Fed. Cas. No. 3226, 3 Cranch, C. C. 143; Faulks v. Kramp, 3 Fed. 898, 17 Blatchf. 432; Edwards v. Davenport, 20 Fed. 756, 4 McCrary, 34; Curran v. Burdsall, 20 Fed. 835; Crawford v. Moore, 28 Fed. 824; Mason v. Muncaster, 9 Wheat. 454, 6 L. ed. 131; Gallaway v. Finley, 12 Pet. 264, 9 L. ed. 1079; Bush v. Marshall, 6 How. 284, 12 L. ed. 440; French v. Spencer, 21 How. 228, 16 L. ed. 97; Irvine v. Irvine, 9 Wall. 617, 19 L. ed. 800; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; Miller v. Tex. etc. R. Co. 132 U. S. 662, 33 L. ed. 487, 10 S. Ct. 206; Ryan v. U. S. 136 U. S. 68, 34 L. ed. 447, 10 S. Ct. 913.

[9] Flanary v. Kane, 102 Va. 547, 46 S. E. 861.

[1] Caple v. Switzer, 122 Mich. 636, 81 N. W. 560; Hubbard v. Milligan, 13 Colo. App. 116, 57 Pac. 738; Osborn v. Scottish-American Mortgage Co., 22 Wash. 83, 60 Pac. 49; Hill v. O'Bryan, 104 Ga. 137, 30 S. E. 996. If the party mortgaging has possession under a bond for a title, and subsequently acquires the fee, his interest will pass to the mortgagee: Skaggs v. Kelly, 42 S. W. 275.

by another, will not pass a subsequently acquired title to such part.[2] While if a deed is sufficient in form to convey the whole interest of the grantor, an interest subsequently acquired will pass to the grantee,[3] still if a deed has been canceled by an order of court, an after-acquired title does not pass to the vendee.[4] While a deed can operate only to pass at the time the title held by the grantor, yet if the parties to it intended that it should pass a greater estate than that held by the owner, he will, if he subsequently acquires such greater estate, be estopped from setting it up against his grantee.[5] If a grantor after having executed a deed with covenants of warranty acquires the interest of minor heirs at a guardian's sale, the title will inure to the benefit of his grantee.[6] If a grantor conveys land by a deed containing covenants of general warranty, and if he afterwards acquires the title to adjoining property, he is estopped from claiming a right of way over the land which he has conveyed.[7]

[2] Altemus v. Nichols, 115 Ky. 506, 74 S. W. 221, 109 Am. St. Rep. 333.

[3] Buchanan v. Harrington, 141 N. C. 39, 53 S. E. 478.

[4] Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781.

[5] Balch v. Arnold, 10 Wyo. 17, 59 Pac. 434.

[6] Pfoorman v. Wattles, 86 Mich. 254, 49 N. W. 40.

[7] Hodges v. Goodspeed, 20 R. I. 537, 40 Atl. 373. See, also, as estoppel from covenant: Maher v. Brown, 183 Ill. 575, 56 N. E. 575; Jones v. Jones, 213 Ill. 228, 72 N. E. 695; Clark v. Lambert, 55 W. Va. 512, 47 S. E. 312; Yock v. Mann, 57 W. Va. 187, 49 S. E. 1019; Duffy v. White, 115 Mich. 264, 73 N. W. 363; Rooney v. Koenig, 80 Minn. 483, 83 N. W. 399; Walker v. Arnold, 71 Vt. 263, 44 Atl. 353; Fox v. Fee, 49 N. Y. S. 292, 24 App. 314; Bennett v. Davis, 90 Me. 457, 38 Atl. 372; Tupy v. Kocourek, 66 Ark. 433, 51 S. W. 69; Owen v. Village of Brookport, 208 Ill. 35, 69 N. E. 952; People's Savings Bank v. Lewis, 37 Wash. 344, 79 Pac. 392; Shepherd v. Kahle, 120 Wis. 57, 97 N. W. 506; Simons v. Stearns, 17 Tex. Civ. App. 13, 43 S. W. 50; Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473; Haggerty v. Byrne, 75 Ind. 499; Miller v. Miller, 140 Md. 174, 39 N. E. 547: Frain v. Burgett, 152 Ind. 55, 52 N. E. 395, 50 N. E. 873; De Haven v. Musselman, 123 Ind. 62, 24 N. E. 171; Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604; Young v. Clippinger, 14 Kan. 148; McDermott Min. Co. v. McDermott, 27 Mont. 143, 69 Pac. 715; Garlick v. Pittsburgh & W. Ry. Co., 67 Ohio St. 223, 65 N. E. 896; Scates v.

§ 1281b. **No estoppel from quitclaim deed.**—A grantee under a quitclaim deed will not obtain a title subsequently acquired by the grantor. Only such title will pass as the grantor possesses at the time.[8] Where a grantor in a quitclaim deed has secured a subsequent decree of court quieting his title to the land conveyed, he is not estopped from asserting the after acquired title.[9] But if the grantor in a quitclaim deed obtains an instrument evidencing and strengthening the interest purported and intended to be conveyed, the grantee will have the benefit of such instrument.[1] A deed is

Fohn, 59 S. W. 837. See, also, in general, Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83, appeal dismissed, 142 U. S. 73, 35 L. ed. 941; Nichols v. Guthrie, 109 Tenn. 535, 73 S. W. 107; Cicotte v. Anciaux, 53 Mich. 227, 18 N. W. 793; City of New Orleans v. Riddell, 113 La. 1051, 37 So. 966; Roller v. Caruthser, 5 App. D. C. 368; Tucker v. Tucker, 72 S. C. 295, 51 S. E. 876.

[8] Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592; Whitson v. Grovesnor, 170 Ill. 271, 48 N. E. 1018; Ridgeway v. Underwood, 67 Ill. 419; Morrison v. Wilson, 30 Cal. 344; Cadiz v. Majors, 33 Cal. 288; Quivey v. Baker, 37 Cal. 465; Anderson v. Yoakum, 94 Cal. 227, 29 Pac. 500, 28 Am. St. Rep. 121; Dart v. Dart, 7 Conn. 250; Morrison v. Whiteside, 116 Ga. 459, 42 S. E. 729; Taylor v. Wainman, 116 Ga. 795, 43 S. E. 58; Graham v. Graham, 55 Ind. 23; Avery v. Akins, 74 Ind. 283; Bryan v. Uland, 101 Ind. 477, 1 N. E. 52; Thorp v. Hanes, 107 Ind. 324, 6 N. E. 920; Graham v. Lunsford, 149 Ind. 83, 48 N. E. 627; Burget v. Merritt, 155 Ind. 143, 57 N. E. 714; Simpson v. Greeley, 8 Kan. 586; Scoffins v. Grandstaff, 12 Kan. 467; Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; Derby v. Jones, 27 Me. 357; Loomis v. Pingree, 43 Me. 299; Harriman v. Gray, 49 Me. 537; Fay v. Wood, 65 Mich. 390, 32 N. W. 614; People v. Miller, 79 Mich. 93, 44 N. W. 172; Gibson v. Chouteau, 39 Mo. 536; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Bell v. Twilight, 26 N. H. 401; Robertson v. Wilson, 38 N. H. 48; Jackson v. Wright, 14 Johns. 193; Jackson v. Hubble, 1 Cow. 613; Woodcock v. Bennet, 1 Cow. 711, 13 Am. Dec. 568; Jackson v. Winslow, 9 Cow. 13; Jackson v. Peek, 4 Wend. 300; Cramer v. Benton, 64 Barb. 522; Perrin v. Perrin, 62 Tex. 477; Sydnor v. Palmer, 29 Wis. 226; Jourdain v. Fox, 90 Wis. 99, 62 N. W. 936.

[9] Graham v. Lunsford, 149 Ind. 83, 48 N. E. 627.

[1] Ford v. Oxelson, 74 Neb. 92, 103 N. W. 1039. Where there is no warranty the grantor may set up an after acquired title: Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; Pence v. Long, 38 Ind. App. 63, 77 N. E. 961; Cald-

merely one of quitclaim in which the operative words are "bargain, sell, release, quitclaim and convey."[2] A deed is likewise one of quitclaim where the language is "grants, bargains, sells, aliens, releases, quitclaims and conveys."[3] And a deed is also a quitclaim where the grantor bargains, sells and quitclaims "all his right, title, interest, estate, claim and demand" in the property.[4]

§ 1282. **Resulting trust.**—If the property in the grantor's hands is subject to a resulting trust in favor of another, the rule that a subsequently acquired title inures to the benefit of the grantee does not apply.[5]

§ 1283. **Privies.**—A grantee is not prevented by the recitals in a deed of his grantor from asserting a paramount title acquired from another source.[6] Where a purchaser from one holding an undivided interest in land enters as a stranger to the rights of his cotenants, he is not estopped

well v. New York & H R. Co., 97 N. Y. S. 588, 111 App. Div. 164. See, also, Garrett v. McClain, 18 Tex. Civ. App. 245, 44 S. W. 47; White v. Dupree, 91 Tex. 66, 40 S. W. 962; Taylor v. Wainman, 116 Ga. 795, 43 S. E. 58; Haskett v. Maxey, 134 Ind. 182, 19 L.R.A. 379, 33 N E. 358; Lewis v. Shearer, 189 Ill. 184, 59 N. E. 580; Hafner v. City of St. Louis, 161 Mo. 34, 61 S. W. 632; Hagensick v. Castor, 53 Neb. 495, 73 N. W. 932; Burget v. Merritt, 155 Ind. 143, 57 N. E. 714; Lockwood v. Bassett, 49 Mich. 546, 14 N. W. 492.

[2] Gibson v. Chouteau, 39 Mo. 536.

[3] Bruce v. Luke, 9 Kan. 201.

[4] Gee v. Moore, 14 Cal. 472.

[5] Fretellier v. Hindes, 57 Tex. 392.

[6] Sands v. Davis, 40 Mich. 14; Blight v. Rochester, 7 Wheat. 535, 5 L. ed. 516; Kerbough v. Vance, 6 Baxt. (Tenn.) 110; Osterhout v. Shoemaker, 3 Hill, 513; Kansas Pacific Ry. Co. v. Dunmeyer, 24 Kan. 725; Grosholz v. Newman, 21 Wall. 481, 22 L. ed. 471; Winlock v. Hardy, 4 Litt. 272; Averill v. Wilson, 4 Barb. 180; Huntington v. Pritchard, 11 Smedes & M. 327; Doe d. Worsley v. Johnson, 5 Jones, 72; Society etc. v. Pawlet, 4 Peters, 480, 7 L. ed. 927; Watkins v. Holman, 16 Peters, 25, 10 L. ed. 873; Gwinn v. Smith, 55 Ga. 145; Riddle v. Murphy, 7 Serg. & R. 235; Owen v. Robbins, 19 Ill. 545. See Campau v. Campau, 37 Mich. 245; Lang v. Wilkinson, 57 Ala. 259.

from setting up against them a tax title or other adverse claim that originated before his purchase.[7] If a person having title, but no patent, to two lots purchased from the State, conveys them by absolute deed to A, and subsequently he also executes two mortgages on these, and a third lot which he owned, to A, the latter's grantee is not estopped by the acceptance by his grantor of the mortgage of the three lots from asserting ownership of the two under the deed absolute in form.[8] But if one is in possession of a mill upon a canal, and his title is founded upon a deed made to him under an order of court, and binding him to repair the canal, he cannot free himself from this duty, upon the ground that the order of court was defective, and that hence no title passed by the deed.[9] Persons whose claims are based upon an independent title are not estopped by a deed.[1] But an estoppel operates as strongly against privies as it does against the original parties.[2]

[7] Sands v. Davis, 40 Mich. 14.

[8] Grosholz v. Newman, 21 Wall. 481, 22 L. ed. 471.

[9] Inhabitants of Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333. To estop a party by a recital he must be competent to contract: Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378; Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850. Where the members of a partnership execute a deed of trust containing recitals recognizing the validity of a prior deed of trust executed by one member of the firm, the firm and its privies are estopped to deny the validity of the prior deed: Schwab Clothing Co. v. Claunch (Tex. Civ. App., Feb. 20, 1895), 29 S. W. 622. Where land is conveyed to a partnership by a deed reciting that the partnership consists of two named persons, and one of such persons executes a trust deed reciting that the firm is composed of said two persons, he is estopped from asserting, as against the mortgagee, that he constituted the firm: Willis v. Lockett (Tex. Civ. App., March 7, 1894), 26 S. W. Rep. 419.

[1] Van Rensselaer v. Kearney, 11 How. (U. S.) 297, 13 L. ed. 703; Gorton v. Roach, 46 Mich. 294, 9 N. W. 422.

[2] Simson v. Eckstein, 22 Cal. 580; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853; Cashman v. Brownlee, 128 Ind. 266, 27 N. E. 560; Dismukes v. Halpern, 47 Ark. 317, 1 S. W. 554; Carter v. Doe, 21 Ala. 72; East Alabama R. Co. v. Tennessee etc. R. Co., 78 Ala. 274; Lee v. Getty, 26 Ill. 76; Fairbanks v. Williamson, 7 Me. 96; Craig v. Franklin County, 58 Me. 479; Campbell

§ 1284. **Right under which party holds.**—Where both parties in ejectment claim under the same right, the plaintiff is not compelled to trace his title further back than to the person holding that right. The defendant in such case must show the adverse right, if it exists.[3] Between a judgment creditor and his debtor no privity exists.[4] If the only ground on which a party in possession defends is, that one

v. Caruth, 32 Fla. 264, 13 So. 432; Sikes v. Basnight, 19 N. C. 157; Stone v. Fitts, 38 S. C. 393, 17 S. E. 136; Martin v. Weyman, 26 Tex. 460; Waco Bridge Co. v. Waco, 85 Tex. 320, 20 S. W. 137; Cowton v. Wickersham, 54 Pa. St. 302; Scwallback v. Chicago etc. R. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

[3] Riddle v. Murphy, 7 Serg. & R. 235. See Brock v. Yongue, 4 Ala. 584; Ketchum v. Schicketanz, 73 Ind. 137; Huntington v. Pritchard, 11 Smedes & M. 327; Lang v. Wilkinson, 57 Ala. 259; Pollard v. Cocke, 19 Ala. 188; Schwallback v. Chicago etc. Ry. Co., 69 Wis. 292, 2 Am. St. Rep. 740; Ellis v. Jeans, 7 Cal. 409; McClain v. Gregg, 2 A. K. Marsh. 454; Bradford v. Urquhart, 8 La. 234, 28 Am. Dec. 137; Royston v. Wear, 3 Head, 8; Gilliam v. Bird, 8 Ired. L. 280, 49 Am. Dec. 379; Den d. Murphy v. Barnett, 2 Murph. 251; Den d. Ives v. Sawyer, 4 Dev. & B. 51; Shotwell v. Harrison, 22 Mich. 410; Doe v. Dugan, 8 Ohio, 87, 31 Am. Dec. 432. As a general rule, a person purchasing land subject to a mortgage is estopped from controverting the execution and validity of the mortgage: Johnson v. Thompson, 129 Mass. 398; Freeman v. Auld, 44 N. Y. 50; Rigg v. Cook, 4 Gilm. 336, 46 Am. Dec. 462; Wanzer v. Blanchard, 3 Mich. 11; Cooper v. Bigly, 13 Mich. 463; Miller v. Thompson, 34 Mich. 10; Holmes v. Ferguson, 1 Or. 220; Crooks v. Douglass, 56 Pa. St. 51; Brinsmade v. Hurst, 3 Duer, 206; Root v. Wright, 21 Hun, 344. But if the deed does not purport to convey the entire title, or the interest conveyed is left in uncertainty, the rule of estoppel does not apply: Campau v. Campau, 37 Mich. 245. A deed of warranty made by one who afterward acquires a patent from the government estops the grantor, and all those subsequently asserting title through him: Shotwell v. Harrison, 22 Mich. 410. The estoppel is alo binding on the heirs of the grantor when it would bind the grantor himself: Fairbanks v. Williamson, 7 Greenl. 96; White v. Brocaw, 14 Ohio St. 339; Upshaw v. McBride, 10 B. Mon. 202; Simmons v. Logan, 1 Harr. (Del.) 110; Bell v. Adams, 81 N. C. 118; Tobey v. City of Taunton, 119 Mass. 404. Where title is claimed by both parties to an action in the same person, neither is required to show title in him: Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383.

[4] Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

of the grantors in the series of deeds had no title, he is bound by the recitals of the deed.[5] "It is too limited a view of the effect of such an estoppel," said the court, "to confine its operation to those only who claim an interest through the deed. A person in possession, sustaining his possession by no other title than a denial that a former owner has parted with his right, is not a stranger; he becomes privy in estate to him whose title he maintains, and is concluded by what destroys it in his hands; for, if title can be traced by B to A, and B can fasten upon A the incapacity of asserting his right, in consequence of his admission that he has conveyed to B, it is not just that a stranger standing on A's claims only, and relying on no superior right, should be permitted to contest the existence of a fact which those interested have settled. The law, therefore, wisely attaches the disability of A to all who maintain his title, and permits such estoppels to be used, not merely defensively, but to sustain actions of ejectment." [6]

§ 1285. **Paramount title.**—If a grantee does not set up a paramount title, the widow of the grantor will be entitled to dower.[7] But the grantee can set up the title of a third person as paramount.[8] While the grantee in a deed-poll may be estopped by admissions intended for him,[9] the general rule is that the grantor only is estopped.[1] In a deed demis-

[5] Kinsman v. Loomis, 11 Ohio, 475.

[6] Kinsman v. Loomis, 11 Ohio, 475.

[7] Kimball v. Kimball, 2 Greenl. 226; Gayle v. Price, 5 Rich. 525; Wedge v. Moore, 6 Cush. 8; Dashiel v. Collier, 4 Marsh. J. J. 601.

[8] Campbell v. Knights, 24 Me. 332, 45 Am. Dec. 107; Sparrow v. Kingman, 1 Comst. 242; Gammon v. Freeman, 31 Me. 243; Foster v. Dwinel, 49 Me. 44. Some of the early cases held otherwise: Bowne v. Potter, 17 Wend. 164; Bancroft v. White, 1 Caines, 185; Sherwood v. Vandenburgh, 2 Hill, 303; Hains v. Gardner, 10 Me. 383.

[9] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35 13 Am. Rep. 556.

[1] Winlock v. Hardy, 4 Litt. 272; Gardner v. Greene, 5 R. I. 104; Great Falls Co. v. Worster, 15 N. H. 414; Sparrow v. Kingman, 1

ing, releasing, and quitclaiming all the grantor's right, estate, title, and demand to a piece of land, with a *habendum* to the grantee, his heirs and assigns, "so that neither I, nor my heirs or assigns, shall hereafter claim or demand any right or title to the premises, or any part thereof, but they, and every one of them, shall, by these presents, be excluded and forever debarred," the grantor is not estopped from setting up an after-acquired title to the land conveyed.[2]

§ 1285a. Estoppel to assert homestead—After-acquired title.—Where the statute provides that the homestead of a married person cannot be encumbered except by the joint act of husband and wife, a mortgage executed by the husband alone is void and inoperative in its inception, and does not become valid by the premises subsequently losing their character as a homestead, and the husband's acquirement of them by a decree of divorce which assigns it to him, and he is not estopped from denying the validity of the mortgage in an action of foreclosure.[3] Where the deed of a married woman is void, by reason of defects in the acknowledgment, she is not estopped from claiming the land.[4] At common law, where a wife has executed a deed conveying an entire tract of land, of which she owns only an undivided half, and she subsequently acquires the other half by inheritance, she is not estopped from asserting title to it.[5]

Comst. 242. See further, on the extent to which a grantee is bound, Haynes v. Stevens, 11 N. H. 28; Hardy v. Nelson, 27 Me. 525; Brown v. Staples, 28 Me. 497, 48 Am. Dec. 504; Coakley v. Perry, 3 Ohio St. 344; Ward v. McIntosh, 12 Ohio St. 233; Addison v. Crow, 5 Dana, 271; Jackson v. Carver, 4 Peters, 1, 7 L. ed. 761; Baldwin v. Thompson, 15 Iowa, 504; Crane v. Morris, 6 Peters, 598; Cutter v. Waddingham, 33 Mo. 269; Denn v. Cornell, 3 Johns. Cas. 174; Averill v. Wilson, 4 Barb. 180; Merryman v. Bourne, 9 Wall. 592, 18 L. ed. 683.

[2] Holbrook v. Debo, 99 Ill. 372.

[3] Powell v. Pattison, 100 Cal. 236. But a judgment upon the note may be rendered in the action: Id.

[4] Stone v. Sledge (Tex. Civ. App., Jan. 3, 1894), 24 S. W. Rep. 697.

[5] Wadkins v. Watson, 86 Tex. 194.

§ 1286. **Fraud or mistake.**—Although a beneficiary may claim under a trust deed, he is not estopped from attacking it as fraudulent in part.[6] A deed of land sold at execution sale, describing the land sold "as all that tract of land set off to defendant as a homestead," does not estop the purchaser from disputing the validity of an assignment of homestead to the former owner.[7] A grantor possessing full knowledge of the facts will not be permitted to testify that the warranty of title made by him was fraudulent and void.[8] A provision of the code that "where a deed purports to convey a greater interest than the grantor was at the time posesssed of, any after-acquired interest of such grantor to the extent of that which the deed purports to convey, inures to the benefit of the grantee" applies to mortgages where no intervening equities exist. But where a mortgage by mistake conveyed a greater interest than that possessed by the mortgagors, and where the consideration was not based upon an interest in the property to be thereafter acquired, title subsequently acquired will not be subject to the mortgage. "Now, manifestly," said the court, "the statute was never intended to apply to a case where the grantee or mortgagee never had in contemplation or expectation the acquiring of any other or greater interest in the property than that then owned by the grantor or mortgagor and when, by oversight or mistake, such greater interest was embraced within the terms of the instrument." [9]

[6] Haliday v. Croom, 9 Lea (Tenn.), 349.

[7] Carrigan v. Bozeman, 13 S. C. 376.

[8] Fredericks v. Davis, 3 Mont. 251. Where an action is brought to restrain a person from placing a house upon land contiguous to that conveyed by him to plaintiff, alleging that the deed recited that such contiguous property was dedicated to the public use as a street, the defendant may plead that the recital was inserted by mistake: Long v. Cruger, 9 Tex. Civ. App. 208, 28 S. W. Rep. 568.

[9] Cook v. Prindle, 97 Iowa, 464, 66 N. W. 781, 59 Am. St. Rep. 424. A grantor is not estopped where the deed has been procured by fraud; Harding v. Randall, 15 Me. 332; Rynear v. Hill, 3 Greene

§ 1286a. **Owner attesting deed by person having no title.**—If the owner knows the contents of a deed made by a person having no title, he will, by attesting it, be estopped from setting up his own title against the grantee and his privies.[1] But where a person who attested a deed with knowledge of its contents, saw the performance of work and the expenditure of money on the property without objecting, was held to be estopped from setting up an adverse title, the court said: "When he attested the deed by which Vanzant conveyed the right of way, he impliedly assented to that deed; and if he meant that it should not affect his rights, he ought to have objected to the construction of the road, he having, according to the evidence in the record, actual knowledge, both of the contents of the deed and of the work done on the premises at all stages of its progress. His mere attestation of the deed would not have been binding upon him if he had not afterwards stood by and seen money expended on the faith of it. Certainly the Georgia Pacific Company had no reason to apprehend that he would ever assert a title in opposition to the deed which he had attested; that company, so far as appears, had no notice whatever of any claim on his part adverse to the title which the Georgia Western Company acquired under the deed, the very deed to which his attestation gave authenticity and credit."[2] So, a person reading and witnessing a deed is estopped from setting up a

(Iowa) 310; Heckman v. Stewart 69 Tex. 255, 5 S. W. 833; Marden v. Dorthy, 12 N. Y. App. Div. 188, 42 N. Y. S. 827; or by mistake; Wheeler v. Meyer, 95 Mich. 36, 54 N. W. 689; Stoughton v. Lynch, 2 Johns Ch. 209; Rich v. Atwater, 16 Conn. 409; Porter v. Nelson, 4 N. H. 130; Long v. Cruger, 9 Tex. Civ. App. 208, 28 S. W. 568; Bower v. McCormack, 23 Gratt. 310; Helm v. Wright, 2 Humph (Tenn.) 72; Schettiger v. Hopple, 3 Grant (Pa.) 154; Leshey v. Gardner, 3 Watt. & S. 314, 38 Am. Dec. 764; Gjerstadengen, 9 N. D. 268, 83 N. W. 230, 81 Am. St. Rep. 575.

[1] Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 3 L.R.A. (N.S.) 879, 52 S. E. 599.

[2] Georgia Pacific Ry. Co. v. Strickland, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282.

mortgage held by him where the grantee in the deed supposes that the property is not encumbered.[3] Likewise, where a bond is given for the conveyance of land, one who witnesses the instrument and advises the purchase will not be permitted to set up a title to a part of the property described in the bond.[3a] If a person signs a deed as a witness without disclosing his right to use a well situated on the property conveyed, he will be estopped from asserting his claim against the grantee who had no knowledge of such claim, even if the witness was not acting in bad faith in omitting to state his right.[4]

§ 1286b. Grantee having notice of claim of attesting witness.—If the grantee has actual notice at the time he accepts the deed, that the person witnessing it had title to the land by a previous deed to him from the same grantor, the witness will not be estopped from setting up his title.[5] A recital in a deed that land adjacent to that conveyed belongs to the grantor will not estop a subscribing witness from asserting title to such adjacent land.[6] If at the time the deed is executed the attesting witness has no title, he is not prevented from subsequently acquiring title and asserting it. Thus, such a witness is not estopped from holding a life estate subsequently acquired through the will of his mother, who at the time of the execution was the owner of the land.[7]

§ 1286c. Prior incumbrance on record.—While a person who holds a prior lien on property will, by witnessing the execution of an instrument creating a subsequent lien, have

[3] Miller v. Bingham, 29 Vt. 82.

[3a] Gheen v. Osborne, 11 Heisk. 61.

[4] Stevens v. Dennett, 51 N. H. 324.

[5] Hale v. Skinner, 117 Mass. 474.

[6] College Point Sav. Bank v. Vollmer, 44 App. Div. 619, 60 N. Y. S. 389.

[7] Fleming v. Ray, 86 Ga. 533, 12 S. E. 944.

his incumbrance postponed or barred, where he has not disclosed his own lien, and has intentionally left the second incumbrancer ignorant of it, this rule has no application where the prior lien is of record for in such case the second incumbrancer is charged by the law with notice.[8] "The mere silence of a mortgagee," said Chancellor Kent, "when he is present at the execution of a subsequent purchase or incumbrance is not sufficient to affect his right, unless that silence was intentional and for the purpose of deception. That inference is not to be drawn from silence alone under the operation of our registry act. There must be active fraud charged and proved, such as false representations or denial upon inquiry or artful assurances of good title, or deceptive silence when information is asked. The burden of the charge, and of the proof lies upon the purchaser. He must make out the fraud, and the mortgagee is presumed innocent until proved to be guilty. This is the true doctrine to be extracted from the cases, and it applies with accumulated force in cases like this, where the party has put his mortgage upon record and given notice to the world." [9]

§ 1286d. **Attorney witnessing contract buying in outstanding title.**—An attorney who had been employed by a vendor to draw a contract of sale, did so, and witnessed its execution and the purchasers, having taken possession of the property conveyed, employed the same attorney to procure an abstract of title. The attorney, in examining the title, found that there was no deed from one of the prior owners. The latter lived near the property, and while he knew that others were in adverse possession of it he never claimed that he had title, but on the contrary had drawn conveyances, and as a notary had taken acknowledgments to instruments affecting the property without disclosing any

[8] Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538.

[9] Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538.

defect in the title. The attorney sought him out and represented to him that his object was to protect his clients, and on such representation procured the prior owner to execute a quitclaim deed to the attorney's brother for a small sum. In a suit to declare this deed fraudulent and to compel the grantee in it to convey, the court held that there was a complete estoppel and that nothing passed by the deed of the prior owner.[1] Mr. Justice Swayne said of the conduct of the attorney in the transaction, that it is always dangerous for an attorney to undertake to act in regard to the same thing, for parties having diverse interests, as such a case requires care and circumspection on his part. "The legal profession" said he "is found wherever Christian civilization exists. Without it society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. Its character depends uopn the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability to integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients." [2] A person taking an acknowledgment to a deed knowing its contents cannot afterwards assert a title not disclosed.[3]

[1] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

[2] Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

[3] Morse v. Byam, 55 Mich. 594, 22 N. W. 54.

§ 1287. **Competency to contract.**—A person who cannot bind himself by contract naturally, cannot be estopped by anything contained in an instrument which purports to be a contract. An infant is not estopped by his deed made during infancy.[4] At common law, a married woman is not estopped by her covenants.[5] But in California, it has been held that a married woman who assumes her maiden name after a decree of divorce which is void, and who lives apart from her husband, acting as and representing herself to be a *feme sole*, can execute a deed of her separate real estate, and acknowledge it as an unmarried woman.[6]

§ 1288. **Tenants in common.**—In California, the question as to the right of one tenant in common to assail the common title, has received some consideration. In one case it is declared that one tenant in common who enters and remains in possession as such cannot assail the common title or question its validity so as to affect his contenant.[7] In another, a tenant in common was allowed to contest the validity of the common title, by using for the protection of his possession an outstanding title which he had purchased.[8] Still

[4] Cook v. Toumbs, 36 Miss. 685. See American Bank v. Banks, 101 U. S. 240, 25 L. ed. 850; Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378.

[5] Strawn v. Strawn, 50 Ill. 33; Lowell v. Daniells, 2 Gray, 161, 61 Am. Dec. 448; Jackson v. Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378; Gonzales v. Hukil, 49 Ala. 260, 20 Am. Rep. 282; Sparrow v. Kingman, 1 Comst. 242; McLeery v. McLeery, 65 Me. 172, 20 Am. Rep. 683; Wight v. Shaw, 5 Cush. 56; Barker v. Circle, 50 Mo. 258; Wood v. Terry, 30 Ark. 385; Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850; Patterson v. Lawrence, 90 Ill. 612; Goodenough v. Fellows, 53 Vt. 102; Preston v. Evans, 56 Md. 476; Trentman v. Eldridge, 98 Ind. 525. But see Massie v. Sebastion, 4 Bibb. 433; Dukes v. Spangler, 35 Ohio St. 119; Hill v. West, 8 Ohio, 222, 31 Am. Dec. 442; Cowles v. Marks, 53 Ala. 490; Merriam v. Boston R. R. Co., 117 Mass. 241; Fogg v. Yeatman, 6 Lea (Tenn.), 575; Jones v. Reese, 65 Ala. 134.

[6] Reis v. Lawrence, 63 Cal. 129, 49 Am. Rep. 83.

[7] Bornheimer v. Baldwin, 42 Cal. 27.

[8] Lawrence v. Webster, 44 Cal. 385.

later, the court attempted to harmonize these apparently conflicting decisions by the drawing of a distinction between them; that is, that in the first case the tenant assailing the common title, entered and remained in possession as such tenant, while in the second, it did not appear that the tenant who assailed the common title was in possession or had acknowledged the existence of the relation of cotenancy.[9] Where a deed has been executed to two persons, one of the grantees, by acting under it in executing conveyances for parts of the land, estops himself from assailing the title of the other grantee. He is not permitted to set up a title paramount to that under which his cograntee claims.[1]

§ 1289. **Possessory title.**—The same rule applies to a case where a person having a possessory title to land dies in possession, leaving heirs who succeed to such possession. If one of the heirs has obtained the exclusive possession of the land, he will not be allowed to set up a title acquired from the owner for the purpose of defeating a recovery by his coheirs of their proportional shares. He must, if he desires to avail himself of such title, first surrender possession to his coheirs, and then he may institute an action of ejectment.[2] The court admitted that a person in possession may purchase an outstanding title for the purpose of fortifying his own, provided that the possession was not taken under circumstances which prevented him from assailing the title of the party claiming. "What I contend for," said Mr. Chief Justice Nelson, "it that one of the coheirs, having derived his possession from the common ancestor, as well as through his coheir, is disabled while standing upon this possession

[9] Olney v. Sawyer, 54 Cal. 379. And see Thomason v. Dayton, 40 Ohio St. 63. As to estoppel arising from conflicting surveys to lot held by tenants in common, see Glasgow v. Baker, 72 Mo. 441.

[1] Funk v. Newcomer, 10 Md. 301. See Braintree v. Battles, 6 Vt. 395.

[2] Phelan v. Kelley, 25 Wend. 390.

from disputing their title. I do not deny but the title thus attempted to be set up may be valid, nor but that the party may avail himself of it after surrendering this possession. In a court of law he clearly could. There might be considerations existing between the coheirs that would lead a court of equity to declare the purchase to have been made for the benefit of all, upon proper terms."[3] Mr. Justice Harris on this point says, by way of illustration: "Thus, where one enters under a contract of purchase, or a license, or a lease, or as a tenant in common, he is held to be estopped from controverting the title under which he entered. The qualification of the general principle stated has its foundation in the law of estoppel, which will not allow a man to do what in honesty and good conscience he ought not to do."[4]

§ 1290. **Descent.**—This rule applies to all cases where a tenancy in common is created, whether by purchase or descent. If, for instance, children take by descent as tenants in common, one of them cannot claim that the common ancestor held no title, and that his possession is based on his individual right, and not on his right as a tenant in common.[5] But if a tenant desires to participate in the benefit of a purchase made by his cotenant, he must elect within a reasonable time to bear his proportion of the outlay.[6]

§ 1291. **Interests acquired by cotenant.**—If tenants in common acquire their interests at different times, and there is no agreement between them as to the title, one of them can purchase an outstanding superior title in order to protect his own. He is not estopped from asserting this title,

[3] Phelan v. Kelley, 25 Wend. 393.

[4] In Burhans v. Van Zandt, 7 Barb. 91, 105.

[5] Jackson v. Streeter, 5 Cowen, 529.

[6] Buchanan v. King, 22 Gratt. 414; Lea v. Fox, 6 Dana, 177; Mandeville v. Solomon, 39 Cal. 133; Potter v. Herring, 57 Mo. 184; Brittin v. Handy, 20 Ark. 403, 73 Am. Dec. 497.

and it does not inure to the benefit of the other tenant, notwithstanding an offer on his part to pay his proportionate part of the money spent in securing it.[7] The rule is, however, where the cotenants derive their title from the same source, that one cannot purchase an outstanding title and set it up against his cotenants, without affording them the opportunity of contributing their ratable shares to obtain the benefit of the purchase.[8] Before a cotenant can acquire for his ex-

[7] Roberts v. Thorn, 25 Tex. 736, 78 Am. Dec. 552.

[8] Titsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Keller v. Auble, 58 Pa. St. 410, 98 Am. Dec. 297; Rothwell v. Dewess, 2 Black, 613, 17 L. ed. 309; Jones v. Stanton, 11 Mo. 433; Sullivan v. McLenans, 2 Clarke, 442, 65 Am. Dec. 780; Knolls v. Barnhart, 71 N. Y. 474; Brown v. Homan, 1 Neb. 448; Venable v. Beauchamp, 3 Dana, 324, 28 Am. Dec. 74; Van Horne v. Fonda, 5 Johns. Ch. 407; Boskowitz v. Davis, 12 Nev. 446; Picot v. Page, 26 Mo. 398; Gossom v. Donaldson, 18 Mon. B. 230, 68 Am. Dec. 723; Weaver v. Wible, 25 Pa. St. 270, 64 Am. Dec. 696; Smith v. Osborne, 86 Ill. 606; Oliver v. Hedderly, 32 Minn. 455; Swinburne v. Swinburne, 28 N. Y. 568. The language of the chancellor in Van Horne v. Fonda, 5 Johns. Ch. 389, 407, on this point is frequently cited: "I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding encumbrance or an adverse title, to disseise and expel his

clusive benefit an outstanding adverse incumbrance or title to the property held in cotenancy it must appear that the other cotenant was aware of the purchase and that the purchaser made an adverse claim to its exclusive benefit. Generally the other cotenant may presume that the acquisition of the adverse claim or incumbrance was for the purpose of supporting and not defeating the common title.[9]

§ 1292. **Widow of intestate.**—A widow of an intestate occupies a fiduciary possession toward the other heirs which will preclude her from buying in an outstanding title, or a mortgage upon the land for her individual benefit. Her possession in such a case, as dowress and guardian of the minor heirs, is as tenant in common with all the heirs.[1] Hence, if she pays off a mortgage, has it assigned to her, and subsequently forecloses and buys the property at the sale in her own name, and executes a deed to one of the heirs in occupation with her, her title is not fortified by the transfer. The interests of the other heirs are not cut off by these proceedings.[2]

cotenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest."

[9] Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216. A purchase of an outstanding title by one co-tenant inures to the benefit of the others: Mauzey v. Dazey, 114 Ill. App. 652; Mills v. Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; Boyd v. Boyd, 176 Ill. 40, 51 N. E. 782, 68 Am. St. Rep. 169; Foltz V. Wert, 103 Ind. 404, 2 N. E. 950; Nalle v. Parks, 173 Mo. 616, 73 S. W. 596; Mahoney v. Nevins, 190 Mo. 360, 88 S. W. 731; Woodlief v. Woodlief, 136 N. C. 133, 48 S. E. 583; Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841; Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123; Burnett v. Kirk, 39 Wash. 45, 80 Pac. 385; Weaver v. Akin, 48 W. Va. 546, 37 S. E. 600.

[1] Knolls v. Barnhart, 71 N. Y. 474.

[2] Knolls v. Barnhart, 71 N. Y. 474. A father who owned land conveyed it with his wife to their son in consideration of the latter agreeing to support them during life, but the deed was subsequently de-

§ 1293. **Contract of sale.**—Two parties held land as tenants in common, and one of them agreed to sell his interest to a third person. The cotenants agreed upon a partition, and executed deeds of partition. The one who had agreed to sell his interest executed a deed to his vendee in compliance with the previous contract. The court held that in equity the vendee stood in his vendor's place, subject to the same liability as warrantor to the other former cotenant, against whom he could not set up an adverse title to the premises.[3] "As a general rule, one tenant in common, before partition, is not permitted to purchase in a superior outstanding claim for his own exclusive benefit, and much less to use it for the expulsion of his cotenant. Such a purchase is considered, in equity, as inuring to the benefit of both, and the purchaser is entitled to contribution. This principle arises from the privity subsisting between parties having a common possession of the same land and a common interest in the safety of the possession of each; and it only inculcates that good faith which seems appropriate to their relative position." "The vendee," said the court, "is, in equity, as much bound to all the legally inherent conditions and consequences of the partition as if he had been a formal and legal party to it. One of these inherent conditions or consequences is the implied warranty, which at least stops him from evicting the

clared to be void as to the father's creditors, and the land was sold to pay his debts. Before a deed was executed under the decree the father died intestate, but after its execution the grantees and the widow partitioned the land by agreement and deeds whereby one-third was conveyed to her. It was held that she was not estopped from claiming title and possession of such third as against the son, who had performed, and was willing to perform, the conditions of his agreement: Miller v. Miller, 140 Ind. 174, 39 N. E. Rep. 547.

[3] Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74. Where a person agrees to sell certain land, in case he acquires title, and divide the proceeds with another, the agreement is not such a conveyance as will operate as an estoppel when he subsequently obtains title: Olephant v. Burns, 146 N. Y. 218

other tenant by adverse title, and binds him to repartition in case of such eviction by a stranger."[4] If a person in possession of land under a parol contract builds a house upon it, and dies in possession, the widow, who obtains possession under him, cannot purchase the title for her benefit to the exclusion of his children.[5]

§ 1294. **Action of ejectment.**—In an action of ejectment the plaintiff must rely on legal title. He cannot have the benefit of a purchase made by the defendant without resorting to a court of equity. There, all matters connected with the transaction may be inquired into, and the expense of the purchase be equitably apportioned among the different parties, and if the purchase inured to the benefit of the plaintiff in the ejectment suit, the title or his proper portion of it may be transferred to him. In an action of law, however, these various matters cannot be determined and settled.[6]

[4] Venable v. Beauchamp, 3 Dana, 321, 324, 327, 28 Am. Dec. 74.

[5] Weaver v. Wible, 25 Pa. St. 270, 64 Am. Dec. 696. Mr. Justice Lewis, in delivering the opinion of the court, after referring to the rules binding tenants in common, said: "There can be no doubt that a widow who comes into possession by and through her husband, who is entitled to dower out of the estate, and who, by reason of her right to administration, has opportunity to suppress or destroy the title papers, is bound by these rules of justice and morality. The law will not permit her to trample upon the rights of her helpless children. The creditors of her husband have an equal claim upon her in this respect. Indeed, they stand upon higher ground than the heirs, because they have given value, and the heirs have not. In this case Abraham Weaver was in possession under a contract with Horbach for the lot. He built a brick house upon it, and died in possession. The law casts the inheritance upon the children at the death of their father, and the widow who came into possession through him, and remained there under his title, had no right to repudiate the contract and purchase the property for herself. If she succeeds in her object in this case, she gets the improvements without paying for them."

[6] Lawrence v. Webster, 44 Cal. 385.

§ 1295. **Acquisition of title at execution sale.**—If land is jointly held by a number of persons, one of them, it is said in a case in Pennsylvania, cannot set up a title purchased by him at a sheriff's sale on an execution against them. He will hold at most, according to this decision, the former interests of his cotenants as a trustee for them.[7] But the view taken by the court of Pennsylvania is not generally recognized as the correct rule. In a case in North Carolina, Mr. Chief Justice Ruffin, in delivering the opinion of the court, said: "The court is not aware of any decision that a tenant in common cannot, nor of any reason why he may not, purchase the interest of his fellow. Their estates are legal and several, the only union between them being that of possession. They do not hold in trust for each other. The rule is only that the possession of one *eo nomine* is the posession of the other, and that such a possession will, therefore, never bar his companion. But the relation between them is not such as to forbid one from purchasing from the other, upon the principle on which a court of equity regards with jealousy the dealings between persons who stand toward each other in a fiduciary capacity. These estates are so completely severed, that at common law, that of the one could not be passed to the other by release, but required a feoffment and livery of seisin. Why, then, should not one purchase the several estate of the other upon execution? There is nothing in the policy of the law against it. There might be a disadvantage to the debtor by judgment, if the law excluded his companion from bidding, as he would probably give more than any other person. There may, indeed, be dealings between the parties themselves, upon which an accountability had arisen, as upon the receipt of too much of the profits by one, or outlays in common improvements or the like, which would render it wrong, as an undue advantage in one, to bring the share of the other to sale; upon which the court might hold the sher-

[7] Gibson v. Winslow, 46 Pa. St. 380, 84 Am. Dec. 552.

iff's deed to be only a security for the true balance that might be found upon a general account. But there is no principle of law which is violated by such a purchase; nor any principle of equity, either in the case declared, and upon the evidence, properly declared in the decree; that is to say, that the defendant's ancestor had no funds of the plaintiff in his hands applicable to the debt of which the plaintiff owed one-half; and that the purchase was made with the party's own money. If a third person have a judgment and execution against one of two tenants in common, his interest may unquestionably be sold; and the sale is valid against him, both in law and in equity. His share is the subject of execution. And we cannot imagine a reason why his companion may not fairly, in such a case, be a bidder. So, if one tenant in common have a judgment against another, he may sell the share of the debtor. If he may not, while others may, it will amount to the loss of his debt; for the judgment of the companion is not a specific encumbrance or an equitable lien, which would follow the land in the hands of a purchaser under another execution as a claim for outlays in improvements might. This case is somewhat different from either of those supposed, inasmuch as the execution was against both the tenants in common for a joint debt. But we cannot conceive that it calls for a different principle. Although the debt was joint, so that each was bound for the whole, yet as between the parties half the debt was the separate debt of each, regarding them merely as tenants in common. Suppose a judgment against heirs for the debt of the ancestor, can it be argued that one heir, in order to save his own estate, is bound to pay the whole debt, and then wait to sue his coheir for contribution, and to have partition also made before he could have satisfaction? We think he could pay his own proportion of the debt; and then that the proportion of the other heir might be raised by the sale of his share *eo nomine*, at which the heir who had paid his part mignt be a bidder. If so, his purchase

of the whole undivided land must also be good; for, in effect, it is the same as paying his part of the debt first, and then buying his companion's share for his default. It is a very common case that one brother buys at sheriff's sale the undivided estate of another brother in descended lands, either for the debt of the ancestor, or that of the brother himself, contracted after the father's death; and we believe the legality of such a purchase has never been questioned. It is a legal, several interest, and as such subject to execution; and the policy of the law is to invite bidders, and exclude none but those whose *duty* it is, in a legal sense, to make the things exposed to sale bring the best price. They are excluded because the interest of a purchaser is to get the thing at the least price, and is, therefore, directly opposed to this duty. But it is not the duty of one heir, or of one tenant in common, as such, to pay the debts of another heir or tenant in common; nor to aid in the sale of his estate by getting the best price for it; nor to refrain from buying it, to his own disadvantage —more than it is the duty of any other person wholly unconnected with them." [8] If a purchase is made at a judicial sale by a tenant in remainder it cannot be said that the sale is fraudulent as to the other cotenants who did not apply for permission to share in the transaction for several years later, simply because the year after the purchase the purchaser sold the land at an advance.[9]

§ 1296. **Sale under trust deed.**—Where an owner of land executes a deed of trust, and subsequently conveys an undivided half interest in the land to another, the interests

[8] Baird v. Baird's Heirs, 1 Dev. & B. Eq. 524, 534, 31 Am. Dec. 399.

[9] Francis v. Million, 26 Ky. Law Rep. 42, 80 S. W. 486. See McGranighan v. McGranighan, 185 Pa. St. 340, 39 Atl. 951. As to purchases at mortgage sales see Retan v. Sherwood, 120 Mich. 496, 79 N. W. 692; Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Ryason v. Dunteen, 164 Ind. 85, 73 N. E. 44; Ladd v. Kuhn, 27 Ind. App. 535, 61 N. E. 747; Barnes v. Board-

of these two parties do not accrue under the same instrument, act of the parties, or by operation of law. If they have no understanding or agreement with each other, their relations are not such as to prevent the purchaser of the undivided half interest from purchasing the estate of his cotenant at a sale under a power contained in the trust deed.[1] "He did not purchase," as said by Mr. Justice McAllister, "an outstanding title or incumbrance adverse to or affecting the common title of his cotenant and himself, but he purchased the several estate of his cotenant under a power and in the mode in which such cotenant authorized the same to be sold in case he failed to pay the notes he had given for the purchase money."[2]

§ 1297. Comments.—One tenant in common can purchase the interest of his cotenant; or the tenants in common can sell the whole interest, and subsequently one of the former tenants can take title from the purchaser. At an execution sale, what more is done? The interest of one tenant, or the interest of all the tenants, is offered for sale. True, it is not a voluntary sale, but that concerns only the judgment debtor. If his interest is offered for sale, whether by his consent or without, why should anyone, who is not under some duty of seeing that the highest price for the property to be sold should be obtained, be prevented from purchasing? If the interest of the tenant alone or of any number of tenants, excluding the purchaser, is offered for sale, there can be little doubt that the remaining tenant whose interest in the property is not affected at the sale may become a purchaser

man, 152 Mass. 391, 9 L.R.A. 571, 25 N. E. 623; Ream v. Robinson, 128 Mich. 92, 87 N. W. 115; Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317; Watson v. Watson, 198 Pa. St. 234, 47 Atl. 1096.

[1] Burr v. Mueller, 65 Ill. 258.

[2] In delivering the opinion of the court in Burr v. Mueller, 65 Ill. 258, 262. See, also, to the effect that a tenant may purchase at an execution sale, Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Gunter

at the execution sale. The only difficulty, it seems to us, that can arise is where the joint interest of all the tenants is sold for a joint debt. It might be said in such a case that as it was in part the fault of the tenant that the judgment against all was obtained, he should not, in good faith, be permitted to take advantage of his own default and be allowed to purchase at the sale on execution, and secure a title which would be valid against his cotenants. It might be contended that it was his duty to remove the debt or charge upon which the judgment was obtained, and that his purchase at the execution sale was only a discharge of the indebtedness. His position might be said to be similar to that of a tenant in common who purchases the title at a tax sale. There is, it must be confessed, much force in this view, inasmuch as the purchaser would have the right to exact contribution from his cotenants in the same manner and to the same extent as if he discharged any other outstanding incumbrance. But we are of the opinion that the same rule would apply to a sale of the joint interest upon a judgment for a joint debt as would prevail were the interest of one tenant only offered for sale. We do not see how such a rule can injure the other contenants. The purchaser secures the title at the sale on execution only because he is the highest bidder. The property sells for no less because he is authorized to purchase. He does not conduct the sale. He is as much interested as his cotenants in having the property sold for as large a price as possible. Or if not interested to that degree, he occpuies. so far as the interests of his cotenants are concerned, no more antagonistic position to them than a stranger would occupy. We are unable to see, therefore, that any policy of the law is violated by allowing a tenant to purchase at execution sale.

§ 1298. **Title accruing at different times.**—The rule that one cotenant cannot acquire an outstanding title for his exclusive benefit is founded on the fact that as the cotenants

acquire their interests at the same time, the confidential relation that exists between them forbids that one should acquire a benefit to the exclusion of the others. Hence, generally, where this reason does not exist, where the cotenants acquire their interests at different times, a modification of this rule is recognized, and in such case, one tenant may acquire an outstanding title, and hold it for his exclusive benefit. He is not compelled to share with his cotenants whatever advantage he may have secured by his purchase.[3] Where a sale under foreclosure proceedings purports to be for the whole premises, a purchaser thereat, who in fact acquires title to an undivided part only, and becomes in law a tenant with the mortgagor, has the right to purchase an outstanding title under a tax deed of the whole, and thus take title to the remainder. In such a case the title of a purchaser under the foreclosure sale is adverse to the title of the mortgagor.[4] Mr. Justice Downer referred to the general rule that if one tenant in common purchases an outstanding title, he holds it for the common benefit of all, and said that this doctrine applies only where tenants in common are in the possession of the land, or where one enters in his relation as tenant, so as to cause his possession to be the possession of all the tenants. The justice then proceeded: "During such possession each is under obligation, morally and legally, to protect their common estate, and if anyone expends money in so doing, as in paying taxes, liens thereon, or buying in an adverse title, he has a right of action against his cotenant to recover the share he should have contributed. While he claims as a cotenant, he is presumed, if he buys in an outstanding title, or pays off an incumbrance, to act not only for himself, but for his cotenant. But after one tenant denies the rights

[3] Rippetoe v. Dwyer, 49 Tex. 498; Roberts v. Thorn, 25 Tex. 736, 78 Am. Dec. 552; King v. Rowan, 10 Heisk. 675; Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Wright v. Sperry, 21 Wis. 331; Frentz v. Klotsch, 28 Wis. 312; Keech v. Sandford, 1 Lead. Cas. Eq., p. 70, n.

[4] Wright v. Sperry, 21 Wis. 331,

of his cotenants, and claims the whole property, such claim being known to them, they have no longer any reason to suppose that in anything he does respecting the land he acts for them; but on the contrary, they know that he claims and intends to act solely for his own benefit. It is then no longer a fraud on their rights for him to buy in an outstanding title, and hold it exclusively for his own benefit. Certainly, it is not unreasonable so to hold, if he may without such outstanding title, by merely entering into possession of and claiming the whole land, acquire by adverse possession a perfect title to the whole, unless his cotenants within twenty years commence an action against him." [5]

§ 1299. **Different rule in Illinois.**—In Illinois, the principle stated in the preceding section is rejected. In a case in that State, the court referred to some of the authorities cited in the preceding section, but refused to follow them. "We do not find sufficient authority or reason," said Mr. Justice Sheldon, in delivering the opinion of the court, "to induce us to adopt the qualification of the doctrine, as applied to tenants in common, that their interest should accrue under the same instrument or act of the law. We regard the rule as founded upon the duty which the connection of the parties as claimants of a common subject creates, and not as dependent upon the accidental circumstances whether the relationship of the parties be constituted by the same instrument or act of the parties, or of the law or not." [6]

§ 1300. **Comments.**—Every rule of laws has or should have some just reason on which it is founded. Examining this question, we find that the reason which prevents one co-

[5] In Wright v. Sperry, 21 Wis. 331, 338.

[6] Bracken v. Cooper, 80 Ill. 221, 229. This view was adopted and this language quoted with approval in the later case of Montague v. Selb, 106 Ill. 49, 58.

tenant from acquiring an outstanding title to the injury of his cotenants is founded on the principle that the relations existing between them are of that confidential character as to compel each to act for the interests of all. But this confidential relation arises from the fact that they become tenants in common by one act, or under one conveyance. If they occupy the relation of tenants in common from distinct sources of title, we do not see what confidential relations can be said to exist between them. If A and B are tenants in common under distinct sources of title, acquired at different times, and C has an adverse title to the title held by A and B, there is nothing to prevent C from asserting his title against A and B. Or, if he so desires, he may oust A from possession and leave B unmolested. If the title held by A and B should be defective, and C should be declared to be the owner of the property, and on his paramount title should succeed to the possession, we know of no rule of law which in the case of such complete failure of title would forbid either A or B, after eviction, from purchasing for his exclusive benefit the superior title of C. Now, what practical difference can there be, if, instead of an assertion of hostile title by C, one of the tenants in common purchases this title, and succeeds to the rights of C? Manifestly, where one tenant in common owes a duty of good faith to his cotenants, he should not be allowed to assert a hostile title, and he owes this duty when he succeeds to the title or possession at the same time, and under the same instrument. But we fail to see any reason for holding that he is bound in any particular duty to his cotenants, with whom he has had no dealings, and to whom he is in law a perfect stranger. Estoppels should not be favored. The doctrine of estoppel should only be appied to cases where any other rule would result in manifest injustice. We think that the rule that one tenant in common cannot set up an adverse title against his cotenant should be limited to cases where the tenancy is created at the same time, and that where

the interests of the tenants are acquired at different times or from different sources, no principle of fair dealing or good faith is violated by holding that one tenant may set up an adverse title against his cotenants.

§ 1301. **Setting up tax title by tenant in common.**— The law does not permit a tenant in common to acquire a tax title for the purpose of defeating the interest of his cotenants. He holds whatever interest he may acquire for their benefit.[7] The same rule has been applied to one who took an assignment of a ceritficate of sale, and became a tenant in common before he received the tax deed.[8] While a tenant

[7] Flinn v. McKinley, 44 Iowa, 68; Choteau v. Jones, 11 Ill. 300, 50 Am. Dec. 460; Allen v. Poole, 54 Miss. 323; Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446; Harrison v. Harrison, 56 Miss. 174; Maul v. Rider, 51 Pa. St. 377; Davis v. King, 87 Pa. St. 261; Fallon v. Chidester, 46 Iowa, 588, 26 Am. Rep. 164; Lloyd v. Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Moore v. Woodall, 40 Ark. 42; Butler v. Porter, 13 Mich. 292; Austin v. Barrett, 44 Iowa, 488; Conn v. Conn, 58 Iowa, 747; Downer's Administrator v. Smith, 38 Vt. 464; Weare v. Van Meter, 42 Iowa, 128, 20 Am. Rep. 616; Shell v. Walker, 54 Iowa, 386; Davidson v. Wallace, 53 Miss. 475; Battin v. Woods, 27 W. Va. 58; Minter v. Durham, 13 Or. 470; Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778; Emeric v. Alvarado, 90 Cal. 444; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Christy v. Fisher, 58 Cal. 256; Bailey v. Campbell, 82 Ala. 342; Johns v. Johns, 93 Ala. 239; Pruitt v. Holly, 73 Ala. 369; Richards v. Richards, 75 Mich. 408; Holterhoff v. Mead, 36 Minn. 42; Sorenson v. Davis, 83 Iowa, 405; Phipps v. Phipps, 47 Kan. 328; Delashmutt v. Parrent, 39 Kan. 548; Watkins v. Eaton, 30 Me. 329, 50 Am. Dec. 637; Middletown Sav. Bank v. Bacharach, 46 Conn. 513; Burgett v. Taliaferro, 118 Ill. 503; Sontag v. Bigelow, 142 Ill. 143; Lewis v. Ward, 99 Ill. 525; Hurley v. Hurley, 148 Mass. 444, 2 L.R.A. 172; Clark v. Rainey, 72 Miss. 151; Robinson v. Lewis, 68 Miss. 69, 24 Am. St. Rep. 254; Jonas v. Flanniken, 69 Miss. 577; Cohea v. Hemingway, 71 Miss. 22, 42 Am. St. Rep. 449; Tanney v. Tanney, 159 Pa. St. 277, 39 Am. St. Rep. 678; Hannig v. Mueller, 82 Wis. 235; Newton v. Marshall, 62 Wis. 8; Clark v. Lindsey, 47 Ohio St. 437; McChesney v. White, 140 Ill. 330; English v. Powell, 119 Ind. 93; Bender v. Stewart, 75 Ind. 88. See, also, Miller v. Mills, 4 Neb. 362.

[8] Flinn v. McKinley, 44 Iowa, 68. See, also, Tice v. Derby, 59 Iowa, 314.

in common is estopped from setting up his tax title, he will have a lien upon the interests of his cotenants for their proportional amount of the taxes paid.[9] If a short time before the tax sale one cotenant buys the interest of his cotenant, the rule that he cannot obtain the title of such cotenant by purchasing at a tax sale does not apply.[1] And if there is no obligation on a tenant to pay the taxes levied against the interests of his cotenants, he is at liberty to purchase the interest of a cotenant at a tax sale.[2] The reason that one cotenant cannot set up an adverse tax title against another cotenant rests upon the community of interest in a common title between those who have a common possession and a common interest in protecting the possession of each. This creates such a relation of confidence and trust between them that it would not be consonant with equity to allow one of them to act to the prejudice of the others as to acquiring title at a tax sale.[3] Where a tenant attempts to set aside a tax deed secured by his cotenant he must with his complaint tender a sufficient amount to reimburse the purchaser.[4]

[9] Moore v. Woodall, 40 Ark. 42.

[1] Meikel v. Meikel, 119 Ind. 421, 20 N. E. 720.

[2] Bennet v. North Colorado Springs Land & Improvement Co., 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281.

[3] Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843, 116 Am. St. Rep. 358. See, also, Funson v. Bradt, 105 Iowa, 471, 75 N. W. 337; Moragne v. Doe ex dem. Moragne, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52; Muthersbaugh v. Burke, 33 Kan. 260, 6 Pac. 252; Schissel v. Dickson, 129 Ind. 139, 28 N. E. 540; Blumenthal v. Culver, 116 Iowa, 326, 89 N. W. 1116; Field v. Farmers & Drovers' Bank, 110 Ky. 257, 61 S. W. 258; Alexander v. Light, 112 La. 925, 36 So. 806; Sleight v. Roe, 125 Mich. 585, 85 N. W. 10; St. Mary's Power Co. v. Chandler-Dunbar Water Power Co., 133 Mich. 470, 95 N. W. 554; Olmstead v. Tracy, 145 Mich. 299, 108 N. W. 649; Easton v. Schofield, 66 Minn. 425, 69 N. W. 326; Hutchinson v. Kline, 199 Pa. 564, 49 Atl. 312; Stoll v. Griffith, 41 Wash. 37, 82 Pac. 1025; Parker v. Brast, 45 W. Va. 399, 32 S. E. 1069; Miller v. Donahue, 96 Wis. 498, 71 N. W. 900; Allen v. Allen, 114 Wis. 615, 91 N. W. 218.

[4] Morris v. Roseberry, 46 W. Va. 24, 32 S. E. 1019. See, also, Allen v Allen, 114 Wis. 615, 91 N. W. 218.

§ 1301a. Cotenancy not existing at time of purchase.—A purchase by a party before he becomes a cotenant with another does not fall within the rule that a tenant in common who purchases an outstanding title or incumbrance on the joint estate is not entitled to contribution from his cotenant.[5] If the relation of tenancy in common has been terminated by one of the cotenants conveying all his interest in the property he may buy an outstanding title and it will not inure to the benefit of his former cotenant.[6] If the title held in common is a nullity and the cotenants are asserting adverse claims against each other, one may purchase the real title for himself and decline to allow his cotenant to participate by bearing his share of the burden.[7] Although tenants in common hold title by distinct conveyances yet if a relationship of confidence between them exists, one of them will not be permitted to use the acquisition of an outstanding title to defeat the rights of the other.[8] It is not essential that two tenants should have acquired their rights under the same instrument to enable one cotenant to claim the benefit of a purchase by another.[9]

§ 1302. Taxes against joint interest.—Where taxes are levied against the joint interest of the tenants in common, and they all neglect to pay the amount due, one of them in purchasing at a tax sale acquires no title against his cotenants, as his purchase is but another mode of discharging the burden resting on all. As he is in default in such a case, his own neglect of duty will not enable him to acquire the title

[5] Carson v. Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691.

[6] Sweetland v. Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676, S. C. 35 N. Y. S. 346, 89 Hun, 543.

[7] NiDay v. Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

[8] United New Jersey R. & Canal Co. v. Consolidated Fruit Jar Co., 55 Atl. 46.

[9] Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216.

of others. His purchase can give him no greater rights than he would have possessed if he had voluntarily paid the whole amount of taxes before the sale for the delinquency was made.[1] In a case in Michigan, it was insisted by counsel that the principle that one tenant in common cannot acquire at a tax sale the interest of his cotenant, was applicable only when this duty was imposed by possession. But Mr. Justice Christiancy, who delivered the opinion of the court, said in response that this was not the true ground on which this principle rested. "The duty springs from the ownership. The sale is an entire thing based upon the delinquency in the payment of the taxes for which the sale is made, and the purchaser cannot be allowed to acquire the title of others in the property by a sale based, in part, upon his own default."[2] Taxes levied on the land are an encumbrance created by statute. Payment of taxes is but a discharge of the tenant's duty. By such payment, or by a purchase at a tax sale, the whole land becomes redeemed, and the purchaser has simply the right to demand contribution.[3]

§ 1303. **Repurchase of tax title by tenant in common.** —Where a party who is in duty bound to pay the taxes on

[1] See Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446.

[2] Butler v. Porter, 13 Mich. 292, 302.

[3] Downer's Administrator v. Smith, 38 Vt. 464. In Allen v. Poole, 54 Miss. 323, Mr. Chief Justice Simrall, in delivering the opinion of the court, says (p. 334): "The extinguishment of the tax title by conveyances to himself would be esteemed to have been done for the common benefit of the tenants in common; and being an expenditure of money for the benefit of the estate and to disencumber the title, would constitute a charge on the property for his reimbursement. But he would not be permitted in equity to set up such title in opposition to his cotenants, and as paramount. Right is meted out to him when his cotenants of the estate refund to him their aliquot portions of the money expended. That allowance was made in the decree to him. A tenant who relieves the estate of the encumbrance of taxes has a charge upon the land itself as against his cotenants for reimbursement."

the land permits it to be sold to a stranger, while this sale may terminate the tenancy as long as such stranger holds the tax title, yet the tenancy has been ended by the wrong of the party in fault, and if he subsequently purchases in the title, the rights of himself and former owners are the same as before the sale. He occupies the same position toward his cotenants that he would have held if the taxes had been paid when due, or if the sale had been made directly to him instead of to another.[4]

§ 1304. **Provision of statute.**—In California, the statute in force in force at the time the case cited in the note came before the court, provided that any deed derived from a sale of real property under the statute should be "conclusive evidence of title, except as against actual fraud or prepayment of taxes," and should entitle the holder to a writ of assistance from the proper court to obtain possession of the property so sold for nonpayment of taxes. One tenant in common bought at a sale for delinquent taxes. The court recognized the general rule that a tenant in common cannot obtain a tax title for the purpose of setting it up against his cotenant, but said that this rule rested upon the doctrine of constructive frauds, and could not apply to a case where, by force of the statute, the fraud must be actual. The court decided that, under the statute referred to, the deed could not be rejected as void, although the court admitted that possibly in equity the purchase would be regarded as a trust, and relief would be administered on that ground, but to entitle a tenant to claim that relief, he should present a case for equitable interference before the court could render him assistance. But on an application to obtain the writ of assistance authorized by the statute, the cotenant, the court decided, could not base a defense upon the invalidity of the deed.[5]

[4] Dubois v. Campau, 24 Mich. 360. Am. Dec. 74. The husband or wife

[5] Mills v. Tukey, 22 Cal. 373, 83 of one tenant in common cannot

§ 1305. **Estoppel against him only who ought to have paid.**—The reason for refusing to allow one cotenant to set up a title acquired at a tax sale is, that it was his duty to discharge the tax. But where this reason does not exist, the rule itself ought to cease. A party who purchases the undivided interest of one cotenant, and who does not go into possession by the aid of the other tenants, or in recognition of their rights, is not estopped from setting up an adverse claim which he acquired before his purchase. He can set up a tax title arising from the default of his grantor.[6]

§ 1306. **Title acquired before creation of tenancy.**—The principles that we have considered in the preceding sections apply to cases only where the tenancy exists at the time of the acquisition of the adverse claim. The confidential relations that exist between the cotenants estop them from asserting an adverse claim against the common title. But, manifestly, this principle can have no application where such adverse title has been acquired before the creation of the tenancy. The privity existing between the tenants not having been commenced, no rule of law will compel one tenant to give his cotenants the benefit of his prior title. He is not estopped from asserting such title.[7]

§ 1307. **Bond for title and deed.**—If in the purchase of a tract of land, the land is sold for a certain price per acre, a bond for title being executed which describes the land as so many acres and not by metes and bounds, and afterward the purchaser accepts a deed in which the land is de-

purchase at a tax sale and hold the interest so purchased: Busch v. Huston, 75 Ill. 343; Rothwell v. Dewees, 2 Black. 613; Young v. Adams, 14 B. Mon. 127, 58 Am. Dec. 654; Robinson v. Lewis, 68 Miss. 69, 24 Am. Rep. 254; Burns v. Byrne, 45 Iowa, 285; Lee v. Fox, 6 Dana, 171.

[6] Sands v. Davis, 40 Mich. 14. See, also, Blackwood v. Van Vleit, 30 Mich. 118.

[7] Sneed's Heirs v. Atherton, 6 Dana, 276, 32 Am. Dec. 70.

scribed by metes and bounds without reference to the number of acres, but reciting the entire consideration, the bond, in a dispute as to the quantity of land actually bargained for, will control, and not the deed. The grantee is not estopped by the deed from showing that the number of acres embraced in the deed was not the quantity of land for which he bargained.[8] Where a deed conveying an undivided interest declares that it is in lieu of a previous deed conveying a specific portion by metes and bounds, the grantee is estopped from claiming under the previous deed.[9] He is estopped, also, where a second deed is taken as a substitute for a former one.

§ 1308. **Deed obtained by fraud.**—Where the grantee in a deed obtains it by fraud upon his grantor, and does not have it recorded, but subsequently sells the land to a *bona fide* purchaser for a valuable consideration, who has no knowledge of the fraud, and such purchaser, instead of taking a deed from the grantee in the fraudulent deed, takes a new deed from the original grantor, who, with knowledge of the fraud practiced upon him, cancels the unrecorded deed, the second deed, though signed and sealed in the presence of but one witness, and not acknowledged, passes the title of the original grantor. The latter, on the principle that where a loss must fall on one of two innocent parties, it must be borne by the one who is the occasion of the loss, will be estopped from disputing the title or claim of such *bona fide* purchaser to the land. The court, after alluding to the rule that a grantor voluntarily executing a deed, though induced to do so by fraud, can avoid it only as against the party who committed the fraud, or against a purchaser with notice, and not against one who took a title apparently valid from one having capacity to convey, declared that a different rule would not prevail

[8] Frank v. Coltrane, 61 Miss. 606. See Kerr v. Kuykendall, 44 Miss. 137.

[9] Emeric v. Alvardo, 64 Cal. 529; Chloupek v. Perotka, 89 Wis. 551, 46 Am. St. Rep. 858.

where the grantor cancels the unrecorded deed, and voluntarily executes a new one to an innocent purchaser.[1] If an attorney drafts a deed in which the proper person is named as grantee, and subsequently fraudulently substitutes another deed for the grantor's signature, in which latter deed the attorney's name is written as grantee, and the grantor signs this deed without inspection, under the belief that it is the original deed which had been examined, the grantor is estopped from attacking the validity of the deed to the attorney, after the latter has conveyed the land for value to an innocent purchaser.[2]

§ 1309. Deed of composition.—If money is paid to one creditor to induce him to sign a deed of composition, another creditor who signs the deed without knowledge of such payment is not precluded from maintaining an action on his debt.[3] "In transactions between a debtor and his creditors, which result in a deed of composition, the utmost good faith is required. The debtor professes to deal upon equal terms with all the creditors who enter into the settlement, and they are supposed to stand in the same situation. This, then, being the principle upon which the compromise rests, it would seem to follow that the debtor, when he induces one creditor to assent to the arrangement by giving him a secret preference over other creditors, is guilty of a fraud in obtaining the composition deed, because it must be presumed that such other creditors, had they known of such secret preference, would not have assented to the composition. And it may be stated, as a general rule, that an agreement cannot be made the subject of an action, or set up as a defense, if it can be impeached on the ground of dishonesty, or as being against public policy." [4] Judge Story, speaking of these secret bargains,

[1] Wilson v. Hicks, 40 Ohio St. 418, 429.

[2] McNeil v. Jordan, 28 Kan. 7.

[3] Partridge v. Messer, 14 Gray, 180, and cases cited.

[4] Davison, J., in Kahn v. Gumberts, 9 Ind. 430, 432.

says: "The purport of a composition or trust deed, in cases of involvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors who become parties generally agree to release all thir debts beyond what the funds will satisfy. Now it is obvious that in all transactions of this sort the utmost good faith is required; and the very circumstance that other creditors of known reputation and standing have already become parties to the deed will operate as a strong inducement to others to act in the same way. But if the signatures of such prior creditors have been procured by secret arrangements with them, more favorable to them than the general terms of the composition deed warrant, those creditors really act, as has been said by a very signficant, though homely, figure, as decoy ducks upon the rest. They hold out false colors to draw in others to their loss or ruin. In modern times, the doctrine has been acted upon in courts of law, as it has long been in courts of equity, that such secret arrangements are utterly void, and ought not to be enforced even against the assenting debtor or his sureties or his friends. There is great wisdom and deep policy in the doctrine; and it is found in the best of all protective policy, that which acts by way of precaution rather than by mere remedial justice; for it has a strong tendency to suppress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practiced upon him, but for the sake of honest and humane and unsuspecting creditors. And hence the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he has been a mere volunteer, offering his services and aiding

in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy. And it is wholly immaterial whether such secret bargains give to the favored creditors a larger sum or an additional security or advantage, or only misrepresent some important fact; for the effect upon other creditors is precisely the same in each of these cases. They are mislead into an act to which they might not otherwise have assented."[5]

§ 1310. Estoppel limited by intention.—Clauses contained in deeds are to be so construed as to carry out the intention of the parties, whenever such intention can be ascertained. When it is sought to fasten an estoppel upon a party to a conveyance, by virtue of some clause or statement contained in it, it is proper to inquire what was meant at the time by the language employed, and when the intention can be determined, the deed should be limited in its operation by way of estoppel to accord with this intention. "A recital is a narration of such deeds, agreements, or facts, as are necessary to explain the grantor's title, and the motives and reasons upon which the deed is founded and entered into. The operation of deeds is a question of intention, and will not be carried further than the parties appear from the tenor of the whole instrument to have agreed; and the doctrine of estoppel is no exception to this general principle. Accordingly, the introduction of a statement into a sealed instrument will not render it conclusive, unless there is sufficient reason for believing that such was the design, or some injustice would result from allowing it to be contradicted. And so it has been held that formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one was ever deceived or induced to alter his position, are

[5] 1 Story's Eq. Juris., §§ 378, 379.

not conclusive. And so as estoppels are founded on intention, they will be limited by it, and will not extend to objects that the parties cannot reasonably be supposed to have had in view. A recital may consequently be an estoppel for some purposes and not for others. Indeed, as has been said, nothing is more obvious than the injustice that would ensue if the formal receipts introduced into conveyances for the convenience of the grantee, and with a view to facilitate the transfer of the title to subsequent purchasers, were treated as conclusive, in opposition to the truth of the case and the understanding of the parties. The estoppel of a deed will be limited to suits based upon it, or growing out of the transaction in which it was executed, and will not extend to a collateral action where the cause is different, although the subject-matter may be the same." [6]

§ 1311. **Estoppel against estoppel.**—There may be an estoppel against an estoppel. Thus, a person conveyed with covenants of warranty land claimed by his father, and after his father had died, bought the same land from the heirs and took a deed therefor. One of the heirs was the wife of the grantee in the first deed, who with such grantee released all her right to the land. The court held that the first grantee could not claim the share of his wife against his own deed, the estoppel on either side neutralizing each other; but as to the residue he was not prevented from availing himself of the estoppel created by his grantor's deed.[7] If A conveys a tract of land by way of mortgage to B, and subsequently, in consideration of an agreement on the part of C to discharge the mortgage, he conveys to C a part of the mortgaged land, inserting in his deed a covenant that the land embraced in the deed is free from encumbrances, the mortgage, so far as the rights of A and C are concerned, is not to be considered

[6] McCullough v. Dashiell, 78 Va. 634, 640.

[7] Kimball v. Schoff, 40 N. H. 190.

an encumbrance included by the covenant.[8] Under this principle falls the rule which we have previously noticed, that a party accepting a deed with a covenant of seisin is prevented from asserting the breach of the covenant, founded on his own seisin of the premises at the time when he accepted the deed.[9] While the grantor, by a covenant of warranty, and against incumbrances is estopped from subsequently acquiring and enforcing a mortgage lien against the property which he has conveyed, still a conveyance of such property by a subsequent grantee subject to duly recorded mortgages on the property operates as an estoppel against the former estoppel. The effect is to set the matter at large and to render the mortgage enforceable in the hands of the original grantor or his assignee.[1] "An estoppel by the subsequent judgment of a competent tribunal prevails over a prior estoppel by deed."[2]

§ 1311a. Reference to streets, alleys, and plats.—An easement of way in a street on which the land conveyed in the deed is described as situated, is acquired by the grantee only when the grantor owns the street.[3] A party who has acquired his title by the purchase of a quitclaim deed from a county will not be allowed, as against a former grantee from the county, to deny the power of the county to make a sale of the land.[4] When land is described in a deed as "bounded upon an alley," the grantor and those claiming under him with notice are estopped from interfering with the use of the alley by the grantee.[5] Where land is platted by the owners, and sold by a description according to the plat, the owners

[8] Watts v. Welman, 2 N. H. 458.

[9] Fitch v. Baldwin, 17 Johns. 161, 166. See, also, Brown v. Staples, 28 Me. 497, 48 Am. Dec. 504. See § 891, *ante*.

[1] Tappan v. Huntington, 97 Minn. 31, 106 N. W. 98.

[2] Per Sanborn, Circuit Judge in Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301.

[3] Cole v. Hadley, 162 Mass. 579.

[4] Roberts v. Northern Pac. R. R. Co., 158 U. S. 1, 39 L. ed. 873.

[5] Rogers v. Bollenger, 59 Ark. 12.

are estopped from claiming that the plat was void because not acknowledged as required by statute.[6] A grantee is not estopped from denying his grantor's title.[7] Where lots bounding on a private street have been sold by an executor, his successors are estopped as against lotowners asking an apportionment of the damages for the condemnation of a part of the street, to contend that the street was illegal, and that no easement on it passed as appurtenant to the lots.[8] Where the lots conveyed are described as being in "A's subdivision according to the plat thereof," this is a recognition of the plat, but it is not an admission that "A" has the title to the land.[9] Where land is conveyed as bounded by an alley there is an implied covenant of the actual existence of such alley.[1] A purchaser by buying lots according to a subdivision becomes committed to the streets forming part of it, and whether they have been opened or not, he cannot be heard to dispute their existence.[2] Where property has been platted by the owners, into lots and streets, and sold with reference to the plat, the owners are estopped as against their vendees from asserting that such streets are not public highways even though the city has not accepted them.[3]

§ 1312. **False representations.**—If a person, by reason of the representation of a mortgagee of land that the mortgage debt is paid, releases an attachment on the goods of the mortgagor, and takes a second mortgage on the same land for the purpose of securing his debt, which he had previously secured by an attachment, the second mortgage, notwithstanding that the first mortgage was on record at the

[6] Pillsbury v. Alexander, 40 Neb. 242.

[7] Wenzel v. Schultz, 100 Cal. 250.

[8] In re St. Nicholas Terrace, 143 N. Y. 621.

[9] Blair v. Carr, 162 Ill. 362, 44 N. E. 720.

[1] Brizzolari v. Senour, 4 Ky. Law Rep. (abstract) 360.

[2] Lafitte v. City of New Orleans, 52 La. Ann. 2099, 28 So. 327.

[3] Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574.

time of the representation, will take precedence over the first mortgage, as between the two mortgagees.[4]

§ 1313. **Parol evidence.**—Though the mortgagee's title is recorded, parol evidence is admissible to raise this estoppel. "It is true that title by mortgage deed cannot be released by parol. But although the legal title might exist, as a paper title, the party may not be able to enforce it, or render it effectual. This species of defense, when offered to control written conveyances or title deeds, is no more obnoxious to the objection of permitting oral evidence to control written, than exists in the ordinary cases of setting aside conveyances for fraud upon oral proof." [5]

§ 1314. **Valuable consideration.**—As has been seen in a previous chapter, only subesquent purchasers who have paid a valuable consideration are protected against prior unrecorded conveyances of which they had no notice. An action of ejectment was brought for a piece of land, and it appeared that A had purchased the land, but caused the deed to be taken in the name of B. This deed was placed on record. Possession of the land was taken by A, and subsequently B, at the request of A, executed a deed conveying the title to him, but this latter deed was not recorded until after the commencement of the action of ejectment. After the execution of this deed from B to A, the former at the request of the latter executed a deed reciting a valuable consideration to C, who at the time was an unmarried woman, but who became subsequently the wife of A. This deed, however, was not delivered or recorded until after the marriage. It did not appear that C knew of the execution of the former deed, but she had given no consideration for the deed executed to her. Still later, A for a valuable consideration sold the

[4] Platt v. Squire, 12 Met. 494.

[5] Platt v. Squire, 12 Met. 494, 500, per Dewey, J.

land to D. The court decided that there was no estoppel in favor of C as against D, who held the legal title.[6]

§ 1315. **Estoppel of grantor in trust deed.**—In the chapter treating of the execution of deeds under powers of sale in trust deeds and mortgages, we showed that the provisions of the deed as to the giving of notice must be strictly followed in order to pass to the grantee of the trustee a valid title. But in this chapter we may notice the effect of an agreement on the part of the debtor that the advertisement of sale may be for a less time than that expressed in the deed. If the debtor makes such an agreement, he cannot afterward object that the provisions in the deed as to advertising were not strictly observed.[7] "Clearly, where the owner of the property agrees that the advertisement may be for a shorter period than that expressed in the deed, he is estopped from setting up the objection that the provision made in the deed as to advertising was not followed."[8].

§ 1316. **Mutuality.**—"An estoppel must be mutual. Both parties must be bound, or neither is estopped."[9] For the purpose of securing a part of the purchase money remaining unpaid, a vendor took from his vendee a confession of judgment, and afterward executed a deed conveying the legal title to the vendee, and in the deed acknowledged the payment of the purchase money. By the deed, the vendor released to the vendee, his heirs and assigns, all his "estate, right, title, interest, claim, and demand whatsoever in law or equity" in or to the land. The deed also contained a general covenant of warranty. On the ground that an estoppel by deed can be taken advantage of only by parties and privies,

[6] Morse v. Wright, 60 Cal. 260.
[7] Maulsby v. Barker, 3 Mackey (D. C.), 165.
[8] Maulsby v. Barker, 3 Mackey (D. C.), 165, per James, J.
[9] Longwell v. Bentley, 3 Grant Cas. 177.

in which class a judgment creditor does not come, the court decided that the vendor was not estopped by his deed from setting up his prior judgment against a subsequent judgment creditor of the vendee. But the court also decided that the conduct being such as to induce the belief that he had no no further claim upon the land, the vendor by an estoppel *in pais* was precluded from setting up his judgment against those who, on the faith of the existence of the facts recited in the deed, had given credit to the vendee.[1]

§ 1317. Title from same source.—If a party receives a title from the same source as another, he is not estopped from disputing that title against others claiming from the same source when no contract relations exist between them. In such a case Chief Justice Marshall, speaking of the doctrine of estoppel, says: "This principle originates in the relation between lessor and lessee, and, so far as respects them, is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation. In considering this subject, we ought to recollect, too, the policy of the times in which this doctrine originated. It may be traced back to the feudal tenures, when the connection between land-

[1] Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

lord and tenant was much more intimate than it is at present; when the latter was bound to the former by ties not much less strict, nor not much less sacred, than those of allegiance itself. The propriety of applying the doctrines between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far he may be bound to this by law, or by the obligations of good faith, in a question depending on all the circumstances of the case, and, in deciding it, all those circumstances are examinable. If the vendor has actually made a conveyance, his title is extinguished in law as well as equity, and it will not be pretended that he can maintain an ejectment. If he has sold, but has conveyed, the contract of sale binds him to convey, unless it be conditional."[2] In a suit to recover possession of land the plaintiff is not estopped by the fact that a deed of partition was executed by a former owner, from whom he obtained his title, and others, by which the premises in controversy were set off to the plaintiff's grantor and another person, with whom the defendant did not connect himself; nor is he estopped by the fact that a former owner through whom plaintiff derives title had executed a deed of quitclaim to a person who subsequently died; nor by the fact

[2] Blight's Lessee v. Rochester, 7 Wheat. 535, 547, 5 L. ed. 516, 519.

that such owner had executed a deed of adjoining land in which the premises in controversy were referred to as having been sold to the person deceased.[3] A person in possession of lands under a devise in fee to himself may purchase and take a deed from another claiming to have an adverse title. He may, if he desires, dispute the validity of the title thus purchased. The doctrine of estoppel does not apply.[4] Said Mr. Justice Bronson: "Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title." [5]

[3] Buffum v. Hutchinson, 1 Allen, 58.

[4] Osterhout v. Shoemaker, 4 Hill, 513.

[5] In Osterhout v. Shoemaker, 3 Hill, 513, 518.

CHAPTER XXXVII.

MERGER.

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§ 1318. A question of intention.—Where the legal estate and an equitable estate become vested in the same person, in the same right, the equitable will merge in most instances in the legal estate.[1] Where a tenant for life acquires the re-

[1] Hopkinson v. Dumas, 42 N. H. 306; James v. Morey, 2 Cowen, 246, 14 Am. Dec. 475; Brown v. Bontee, 10 Smedes & M. 268; Little v. Bowen, 76 Va. 724; Gardner v. Astor, 3 Johns. Ch. 53, 8 Am. Dec. 465; Wills v. Cooper, 1 Dutch. 137; Mason v. Mason, 2 Sand. Ch. 433; Nicholson v. Halsey, 1 Johns. Ch. 422; Healy v. Alston, 25 Miss. 190;

mainder, the life estate merges in the fee. The merger, however, takes place only to the extent of the interest of the life tenant in the remainder.[3] And no merger is effected if it is in the interest of equity and justice that the estates be kept distinct and such is the intention of the parties.[4] So, as a general rule, the question whether in a given case there has been a merger, or the two estates are to be kept distinct, is a question of intention, generally determined by the interest of the person in whom the estates are vested, or by the requirements of substantial justice.[5] For instance, where land

Habergham v. Vincent, 2 Ves. Jr. 204; Hancock v. Hancock, 22 N. Y. 568; Hatch v. Kimball, 14 Me. 9; Davis v. Pierce, 10 Minn. 376; Wade v. Paget, 1 Brown Ch. 363; Finch's Case, 4 Inst. 85; Selby v. Alston, 3 Ves. 339; Lyon v. McIlvaine, 24 Iowa, 9; Philips v. Brydges, 3 Ves. 126; Downes v. Grazebrook, 3 Mer. 208; Ayliff v. Murray, 2 Ttk. 59; Goodright v. Wells, Doug. 771; Harmwood v. Oglander, 8 Ves. 127; Cooper v. Cooper, 1 Halst. Ch. 433; Byington v. Fountain, 61 Iowa, 512. See, also, Bassett v. O'Brien, 149 Mo. 381, 51 S. W. 107; Frothman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. So a life estate will be merged in the remainder: Bond v. Moore, 236 Ill. 576, 19 L.R.A.(N.S.) 540, 86 N. E. 386; In re Wadsworth, 111 N. Y. Supp. 630, 58 Misc. 489; McCreary v. Coggeshall, 74 S. C. 42, 7 L.R.A. (N.S.) 433, 53 S. E. 978, 7 A. & E. Ann. Cas. 693.

[2] Harrison v. Moore, 64 Conn. 344, 30 Atl. 55. See, also, Field v. Peoples, 180 Ill. 376, 54 N. E. 304; Wilder v. Holland, 102 Ga. 44, 29 S. E. 34.

[3] Clark v. Parsons, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157.

[4] Wehrhane v. Deposit etc. Co., 89 Md. 179, 42 Atl. 930.

[5] Pike v. Gleason, 60 Iowa, 150; Simonton v. Gray, 34 Me. 50; Mallory v. Hitchcock, 29 Conn. 127; Fassett v. Mulock, 5 Colo. 466; Baldwin v. Norton, 2 Conn. 161; Bassett v. Mason, 18 Conn. 131; Lockwood v. Sturtevant, 6 Conn. 373; Franklyn v. Hayward, 61 How. Pr. 43; Robinson v. Leavitt, 7 N. H. 73; Grover v. Thatcher, 4 Gray, 526; Gibson v. Crehore, 3 Pick. 475; Loud v. Lane, 8 Met. 517; Given v. Marr, 27 Me. 212; Hatch v. Kimball, 14 Me. 9; Hatch v. Kimball, 16 Me. 146; Holden v. Pike, 24 Me. 427; Slocum v. Catlin, 22 Vt. 137; Smith v. Roberts, 91 N. Y. 470; Downer v. Fox, 20 Vt. 388; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400; Tuttle v. Brown, 14 Pick. 514; Brooks v. Rice, 56 Cal. 428; White v. Hampton, 13 Iowa, 259; Shimer v. Hammond, 51 Iowa, 401; Evans v. Kimball, 1 Allen, 240; Marshall v. Wood, 5 Vt. 250; Bullard v. Leach, 27 Vt. 491; Walker v. Baxter, 26 Vt. 710; Myers v. Brownell, 1 Chip. D. 448; Silliman

is subject to two mortgages of different dates, and a person buys the land and takes an assignment of the senior mortgage for the protection of his title, there will not be a merger of

v. Gammage, 55 Tex. 365; Hinchman v. Emans, 1 N. J. Eq. (Sax.) 100; Duncan v. Smith, 31 N. J. L. 325; Bailey v. Willard, 8 N. H. 429; Johnson v. Elliott, 26 N. H. 67; Stantons v. Thompson, 49 N. H. 272; Heath v. West, 26 N. H. 191; Hutchins v. Carleton, 19 N. H. 487; Bell v. Woodward, 34 N. H. 90; Weld v. Sabin, 20 N. H. 533, 51 Am. Dec. 240; Drew v. Rust, 36 N. H. 335; Moore v. Beasom, 44 N. H. 215; McClain v. Sullivan, 85 Ind. 174; Grellet v. Heilshorn, 4 Nev. 526; Edgerton v. Young, 43 Ill. 464; Lyon v. McIlvaine, 24 Iowa, 9; Richardson v. Hockenhull, 85 Ill. 124; Durham v. Craig, 79 Ind. 117; Vanderkemp v. Shelton, 11 Paige, 28; McGiven v. Wheelock, 7 Barb. 22; Lebanon Bank v. Essex, 84 Ind. 144; Millspaugh v. McBride, 7 Paige, 509, 34 Am. Dec. 360; Sheldon v. Edwards, 35 N. Y. 279; Bissell v. Lewis, 56 Iowa, 231; Skeel v. Spraker, 8 Paige, 182; James v. Johnson, 6 Johns. Ch. 417; Champney v. Coope, 34 Barb. 539; Kellogg v. Ames, 41 Barb. 218; Loomer v. Wheelwright, 3 Sand. Ch. 135; Judd v. Seekins, 62 N. Y. 266; Angel v. Boner, 38 Barb. 425; Clift v. White, 12 N. Y. 519; Fox v. Weishuhu, 55 Tex. 33; Starr v. Ellis, 6 Johns. Ch. 393; Gardner v. Astor, 3 Johns. Ch. 53, 8 Am. Dec. 465; White v. Knapp, 8 Paige, 173; Spencer v. Ayrault, 10 N. Y. 202; Bascom v. Smith, 34 N. Y. 320; Day v. Mooney, 4 Hun, 134; Snyder v. Snyder, 6 Binn. 483, 6 Am. Dec. 493; Davis v. Pierce, 10 Minn. 376; Duncan v. Drury, 9 Pa. St. 332, 49 Am. Dec. 565; Wallace v. Blair, 1 Grant Cas. 75; Carter v. Taylor, 3 Head, 30; Hinds v. Ballou, 44 N. H. 619; Van Wagenen v. Brown, 26 N. J. L. 196; Den v. Vanness, 10 N. J. L. (5 Halst.) 102; Hart v. Chase, 46 Conn. 207; Donald v. Plumb, 8 Conn. 453; Dircks v. Logsdon, 59 Md. 173; Nurse v. Yerwarth, 3 Swanst. 608; Carpenter v. Brenham, 40 Cal. 221; Mole v. Smith, Jacob, 490. See St. Paul v. Viscount Dudley, and Ward, 15 Ves. 167; Thom v. Newman, 3 Swanst. 603; Callaghan v. O'Brien, 136 Mass. 378; De Lisle v. Herbs, 25 Hun, 485; Bank of Reis, 136 Ill. 242; Watson v. Gardner, 119 Ill. 312; Gresham v. Ware, 79 Ala. 192; Scrivner v. Dietz, 84 Cal. 295; Osborne v. Taylor, 60 Conn. 107; Myers v. O'Neal, 130 Ind. 370; Hanlon v. Doherty, 109 Ind. 37; Green v. Currier, 63 N. H. 563; Little v. Bowen, 76 Va. 724; Watson v. Dundee M. & T. Ins. Co., 12 Or. 474; Keith v. Wheeler, 159 Mass. 161; Burton v. Perry, 146 Ill. 71; National Ins. Co. v. Nordin, 50 Minn. 336; Sieberling v. Tipton, 113 Mo. 373; Jewett v. Tomlinson, 137 Ind. 326; Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218; Freeman v. Moffett, 119 Mo. 280; McCrory v. Little, 136 Ind. 86; Burt v. Gamble, 98 Mich. 402; Walker v. Goodsill, 54 Mo. App. 631; Sprague v. Beamer, 45 Ill. App.

such mortgage with the equity of redemption, so as to give the junior mortgagee a preference in the division of the proceeds of a sale of the mortgaged premises.[6] Nor will there be a merger if the owner of the mortgaged premises conveys them to a mortgagee in satisfaction of the mortgage debt, for the purpose of saving the expense of a foreclosure, when an intervening mortgage exists.[7] In older cases it is said that it is an inflexible rule at law that a merger occurs whenever a lessor and a greater estate coincide in the same person in one and the same right, and without any intervening estates.[8] This rule, however, is now under the reformed procedure adopted in most States, for practical purposes, virtually obliterated.[9]

17. Question of merger in court of equity is one of intention: Wettlaufer v. Ames, 133 Mich. 201, 94 N. W. 950; Hayden v. Lauffenburger, 157 Mo. 88, 57 S. W. 721; Mathews v. Jones, 47 Neb. 616, 66 N. W. 622; Peterbourough etc. Bank v. Pierce, 54 Neb. 712, 75 N. W. 20; Andrus v. Vreeland, 29 N. J. Eq. 394; Gore v. Brien (N. J.) 35 Atl. 897; Powell v. Patrick, 64 S. C. 190, 41 S. E. 894; Lipscombe v. Goode, 57 S. C. 182, 35 S. E. 493; Copeland v. Burkett (Tenn.) 45 S. W. 533; Hapgood Shoe Co. v. Crockett etc. Bank (Tex.) 56 S. W. 995; Rorer v. Ferguson, 96 Va. 411, 31 S. E. 817; Stewart v. Eaton, 20 Wash. 378, 55 Pac. 314; Tolsma v. Adair, 32 Wash. 383, 73 Pac. 347; Turner v. Stewart, 51 W. Va. 504, 41 S. E. 924; McCreary v. Coggeshall, 74 S. C. 42, 7 L.R.A.(N.S.) 433, 53 S. E. 978, 7 A. & E. Ann. Cas. 693; Moffett v. Farwell, 222 Ill. 543, 78 N. E. 925; In re Stafford, 94 N. Y. Supp. 194, 105 App. Div. 46.

[6] Millspaugh v. McBride, 7 Paige, 509, 34 Am. Dec. 360.

[7] Brooks v. Rice, 56 Cal. 428. For a discussion of the rule that all stipulations contained in an antecedent contract to convey are merged in the deed subsequently executed, and delivered and accepted as performance of the contract, see §§ 850, a and 850 b, *ante*.

[8] Rumpp v. Gerkins, 59 Cal. 496; Rankin v. Wilsey, 17 Ia. 463; Roberts v. Jackson, 1 Wend. (N. Y.) 478; Aiken v. R. Co., 37 Wis. 469.

[9] See McCreary v. Coggeshall, 74 S. C. 42, 1 L.R.A.(N.S.) 433, 53 S. E. 978, 7 A. & E. Ann. Cas. 693, in which the court says: "From this review we think it clear the later cases in this state establish the proposition which, as we have seen, is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least merger will not take place if op-

§ 1319. **Continued.**—Where A made a deed absolute upon its face, but intended as a mortgage to secure a note to B, and afterward executed a mortgage to C, and subsequently B assigned his note and interests in the property to D, and the latter in a short time afterward procured a deed of the property from A, and then reassigned the mortgage interest to B, who commenced a suit for foreclosure, it was held that there was no merger so as to give C's mortgage priority over that of B.[1] "In law, a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would continue to exist at law;

posed to the intention of the parties, affirmatively proved or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united. It is argued, however, that though in equity an intention that it shall not take place may prevent merger, at law whenever the greater and lesser estate coincide in the same person without any intermediate estate, the rule that merger takes place is inflexible, and entirely unaffected by the intention. . . . It will hardly be thought that any such difference "at law" and "in equity" can be rested on a difference between the jurisdiction and practice of courts of law and courts of equity. If this supposed distinction ever had such a foundation it has been taken away by the adoption of the reformed procedure: Pomeroy's Code Remedies, Secs. 94 to 103. The court, on its law side, will recognize and enforce equitable rights wherever they are necessarily involved in the decision of a legal issue. For example, if A, in a suit against B to recover possession of land, proves his title, and B shows a deed from A for the land in dispute, this would be a complete bar to A's recovery but if A then proves the deed to B was intended as a mortgage and the debt had been paid, he would still have the right to recover possession, and it makes no difference whatever whether we call his right legal or equitable. So, if in an action to recover possession of land, the title of the plaintiff depends upon an alleged merger, if the merger would be held by a court of equity not to have taken place, because contrary to the intention, the plaintiff could not recover."

[1] Grellet v. Heilshorn, 4 Nev. 526.

and sometimes preserve it, when at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united." [2] Mr. Chief Justice Treat says that the conclusion from all the authorities clearly is, "that if a party acquires an estate upon which he has an encumbrance, the encumbrance is, in equity, considered as subsisting or extinguished, according to his intentions, expressed or implied. The intention is the controlling consideration, where it has been made known, or can be inferred from the acts and conduct of the party. And the court will look into all the circumstances of the case to ascertain his real intention. If it appears that he intended to discharge the encumbrance, and rely exclusively upon his newly-acquired title, the encumbrance is regarded as extinguished, and cannot afterward be set up to strengthen and support that title. If no intention has been manifested, equity will consider the encumbrance as subsisting, or extinguished, as may be most conducive to the interests of the party. If no evidence of his intention appears, and it is a matter of indifference to him whether the encumbrance be kept alive or not, it is regarded as extinguished." [3] So, while equity interferes to prevent a merger where it is necessary to do so in order to do substantial justice between the parties, it will not interfere where the result of not allowing a merger would be to effectuate a wrong or fraud.[4] The intent of the parties may be in-

[2] Rumpp v. Gerkens, 59 Cal. 496, per Mr. Justice Thornton, in delivering the opinion of the court. Merger cannot be proven solely by the record, as the question is one of intent: Chase v. Van Meter, 140 Ind. 321, 39 N. E. Rep. 455. When a mortgagor conveys the land to a second mortgagee fraudulently including in the deed a provision obligating the grantee to assume and pay the first mortgage and a third mortgage of which the grantee is ignorant, and the deed is not delivered, but is placed on record by the grantor, and the grantee repudiates it as soon as he learns of its effect, and there is no change of possession of the property, nor surrender of the mortgage and note, there is no merger: Cook v. Foster, 96 Mich. 610.

[3] In Campbell v. Carter, 14 Ill. 286, 290.

[4] Frothman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145.

ferred from the interest of the one who receives the conveyances.[5] The interest of the mortgagee determines the fact.[6] And the fact may be determined or the conduct of the owner.

In that case the Supreme Court of Illinois per Magruder, J., says: "Appellee being the holder of the mortgage when the original vendors in the contract or their grantee, the appellant, should execute to him a deed, there would unquestionably be a merger in appellee of the two estates—the legal estate of mortgagor and the equitable estate of mortgagee. It is well settled that at law when a greater or lesser or a legal and equitable estate coincide in the same person the lesser or the equitable state is immediately merged and annihilated: 15 Am. & Eng. Ency. of Law (1st ed.) p. 314. It is true that the question whether or not a merger takes place in equity depends upon the intention of the parties and a variety of other circumstances: 15 Am. & Eng. Ency. of Law (1st ed.) p. 314. But 'a merger will be prevented by equity only, however, for the purpose of promoting substantial justice; it will not prevent a merger where such prevention would result in carrying a fraud or other unconscientious wrong into effect': 15 Am. & Eng. Ency. of Law (1st ed.) p. 315. Pomeroy, in his work on Equity Jurisprudence (section 794) says: 'What ever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented, and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect under the color of legal forms. Equity only interposes to prevent a merger in order thereby to work substantial justice.' In this case it would be an injustice to the original vendors in the contract, and to appellant, their grantee, to permit appellee to hold the mortgage as a subsisting incumbrance, and the note as a subsisting indebtedness, after a deed had been executed to the appellee by Reka and Ferdinand Huckstead and the appellant. Hence, upon the execution of the deed required by the contract to appellee, there would be a merger which would protect the interest of appellant and the vendors in the contract. Although a conveyance of the mortgagor's estate to the mortgagee does not operate as a merger in equity unless it was intended to have that effect, yet when the holder of the notes secured by the mortgage accepts a conveyance from the mortgagor of the lands, and gives the notes up to the maker, or, as here, deposits them in court, and no reason exists for keeping the incumbrance alive, there will be a complete merger, and the mortgagee will acquire the entire title: Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642."

[5] Oak Creek Val. Bank v. Helmer, 59 Neb. 176, 80 N. W. 891.

[6] Fort Scott Building etc. Ass'n v Palatine Ins. Co. etc., 74 Kan. 272, 86 Pac. 142; Ann Arbor Savings Bank v. Webb, 56 Mich. 377, 23 N. W. 51.

If the fee and mortgage have merged in him, and he treats them as having coalesced and assumes to convey the entire estate, the merger is conclusively established.[7] If there is an agreement that the lien should remain intact, there is no merger.[8] If a mortgagee to whom the property has been conveyed files both the deed and mortgage for record at the same time, his assignment of the mortgage subsequently as security shows an intention to keep the mortgage alive and, hence, there is no merger.[9]

§ 1320. Reference in deed to cancellation of mortgage.—Although a deed of warranty may refer to a mortgage for the purchase money "as having been canceled by assignment," the mortgage will not thereby become merged in the legal title when the interests of the holder of the mortgage require it to be upheld.[1] "Mergers are not favored in law or in equity, and the separate estates will be sustained when the parties so intend, and this intention will be inferred when justice permits, and the interests of the parties require it."[2] If a deed is fraudulent as against the grantor's creditors, and the grantee takes from a prior mortgagee a deed of quitclaim of all his interest in the premises which contains these words, "which said mortgage is hereby canceled and discharged, the said" grantor, naming him, "having recently conveyed his interests in the premises" to the grantor named, the deed constitutes an assignment, and will not have the effect of a merger as against the creditors of the grantor.[3]

[7] Ames v. Miller, 65 Neb. 204, 91 N. W. 250.

[8] Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147.

[9] Longfellow v. Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117, affirmed in 59 Neb. 455, 81 N. W. 307.

[1] Bean v. Boothby, 57 Me. 295.

[2] Bean v. Boothby, 57 Me. 295, per Danforth, J.

[3] Crosby v. Taylor, 15 Gray, 64, 77 Am. Dec. 352.

§ 1321. **Payment of mortgage.**—When a mortgage is paid, the intention of the parties at the time payment is made must control the effect to be given to such payment, in considering whether there has been a merger, or whether the equitable title will still be considered as in existence. If it is apparent that the intention at the time was to discharge the mortgage, this intention must prevail, and no subsequent change of intention can operate to give effect to a lien that has been intentionally destroyed.[4] Thus, an owner of land on which there were four trust deeds conveyed it to his brother, the deed recognizing such trust deeds. The grantee covenanted to pay off the debts of the grantor, for which he and two others were bound as sureties. The grantee paid part of the first, second, and third mortgage debts, but received no assignment from the creditors. The property conveyed was worth considerably more than the mortgage and other debts at the time of the execution of the deed, but had since that time depreciated in value, and finally the trustee in the first two deeds sold the land to pay the amount still due, and there remaining a balance, it was decided that the grantee was not entitled to have this balance applied to reimburse him for what he had paid upon the debts secured by the first three deeds, as he was to be considered as paying his own debts.[5]

§ 1322. **Estoppel.**—The grantor may be estopped, when he sells the land as free from encumbrances, from as-

[4] Given v. Marr, 27 Me. 212; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400; Champney v. Coope, 34 Barb. 539; Gayle v. Wilson, 30 Gratt. 166; Cole v. Edgerly, 48 Me. 108; Loomer v. Wheelwright, 3 Sand. Ch. 135; Aiken v. Milwaukee & St. Paul R. R. Co., 37 Wis. 469; Gardner v. Astor, 3 Johns. Ch. 53, 8 Am. Dec. 465. See Willson v. Burton, 52 Vt. 394; Dickason v. Williams, 129 Mass. 182, 37 Am. Rep. 316. As a general rule, where the mortgagee becomes owner of the fee the mortgage is merged therein, unless a contrary intention appears: Wyatt Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241; Ames v. Miller, 65 Neb. 204, 91 N. W. 250; Pearson v. Bailey, 180 Mass. 229, 62 N. E. 265; Chase Nat. Bank v. Hastings, 20 Wash. 433, 55 Pac. 574.

[5] Gayle v. Wilson, 30 Gratt. 166.

serting as against the purchaser that a merger did not occur of two titles united in him.[6] And on the other hand, the owner who has reissued a mortgage paid by himself may be estopped from attacking its validity by asserting that there was a merger at the time of payment.[7] Thus, a purchaser of land subject to a mortgage which the purchaser in his deed has assumed and agreed to pay as a part of the consideration, may, after having paid the mortgage and taken an assignment of it in blank at the time of payment instead of a satisfaction, reissue such mortgage by filling up the blank with another's name, and such mortgage is perfectly valid.[8] "The owner of lands," said Cooley, J., "who treats a mortgage upon the land, which has been assigned to him as a valid instrument, and transfers it as such, is estopped from insisting, as against the assignee or anyone claiming under him, that in his hands it had merged and disappeared in the fee." [9]

§ 1323. **Purchase of equity of redemption by prior mortgagee.**—Undoubtedly, as a general proposition, where a prior mortgagee purchases the equity of redemption, his mortgage and such equity of redemption do not become merged so as to make the whole title subject to a second mortgage. But if a prior mortgagee purchases by deed the equity of redemption, and afterward sells the land for a price sufficient to pay the sum paid for the equity of redemption and also both the mortgages, his mortgage by such sale becomes satisfied. On the foreclosure of the second mortgage the

[6] Bulkeley v. Hope, 1 Kay & J. 482, 1 Jur., N. S., 864.

[7] Kellogg v. Ames, 41 N. Y. 259; Powell v. Smith, 30 Mich. 451.

[8] Kellogg v. Ames, 41 N. Y. 259.

[9] In Powell v. Smith, 30 Mich. 451, 452. Where notes becoming due at different times are secured by mortgage, and the mortgage is foreclosed as to the last note, it may be foreclosed again against the purchaser of the equity of redemption after foreclosure, who assumed to pay the other notes as a part of the purchase money. Such purchaser is estopped from asserting that the mortgage was merged by foreclosure: Hill v. Minor, 79 Ind. 48.

proceeds of the foreclosure sale will be first applied in discharge of the second mortgage.[1]

§ 1324. **Same person and same right.**—To effect a merger of two estates, they must vest in the same person and in the same right.[2] There cannot be the merger of an equitable estate into a partial or particular legal estate.[3] "In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely coextensive, must be acquired and held in the same right, and there must be no right outstanding in a third person to intervene between the right held and the right acquired."[4] There will be no merger where the *cestui que trust* acquires the legal title by a conveyance which is void.[5] If a tenant for life pays off

[1] Webb v. Meloy, 32 Wis. 319. See International Bank v. Wilshire, 108 Ill. 143; Pike v. Gleason, 60 Iowa, 150. Where the equity of redemption is purchased by the mortgagee, and by consent of the mortgagor he retains the mortgage for the purpose of cutting off liens created after its execution, the mortgage is not merged in the title: Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145. Where the legal title is purchased by the holder of a senior mortgage he is entitled to keep his mortgage alive to protect the title against a valid later mortgage: Swatts v. Bowen, 141 Ind. 322, 40 N. E. Rep. 1057. When the equity of redemption is purchased by the mortgagee, there is no merger unless such merger would not militate against the interests of anyone or is the desire of the mortgagee: Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145; Howard v. Clark, 71 Vt. 424, 45 Atl. 1042, 76 Am. St. Rep. 782.

[2] Stantons v. Thompson, 49 N. H. 272; Lockwood v. Sturdevant, 6 Conn. 373; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400. See New England Jewelry Co. v. Merriam, 2 Allen, 390; Denzler v. O'Keefe, 34 N. J. Eq. 361; Grover v. Thatcher, 4 Gray, 526; Dutton v. Ives, 5 Mich. 515; Bell v. Woodward, 34 N. H. 90. See, also, Topliff v. Richardson, 76 Neb. 114, 107 N. W. 114.

[3] Philips v. Brydges, 3 Ves. 125; Selby v. Alston, 3 Ves. 339; Habergham v. Vincent, 2 Ves. Jr. 204; Boteler v. Allington, 1 Bro. Ch. 72; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400; Merest v. James, 6 Madd. 118; Donalds v. Plumb, 8 Conn. 453; Goodright v. Wells, Doug. 771.

[4] Hunt v. Hunt, 14 Pick. 374, 384, 25 Am. Dec. 400, per Shaw, C. J.

[5] Buchanan v. Harrison, 1 Johns.

an encumbrance, as his estate is a temporary one, a merger will not be presumed.[6] Where a wife was, before marriage, possessed of a term of years, renewable forever, in a city lot, and her husband, after marriage, purchased the reversion to this lot nothing being said in the deed conveying the reversion as to extinguishing the term, it was held that there was no merger by which the interest of the wife in the property was extinguished, but that it survived to her on the death of the husband.[7] When a mortgagee succeeds as a devisee under a will to an undivided half of the premises, there is no merger.[8] Where a trustee for a married woman purchased a mortgage on the trust property executed by the *cestui que trust,* and her husband, before the conveyance to him, and subsequently in compliance with the directions of his *cestui que trust,* conveyed the land, subject to the mortgage, and, at the same time, assigned the mortgage to the grantee, no merger, it was held, was caused of the mortgage in the trustee's hands. Judgments, therefore, obtained against him before the execution of his conveyance could not operate as liens on the property.[9]

§ 1325. **Mortgagee's purchase.**—It is generally to the mortgagee's interest to preserve his mortgage interest when there are other liens. In case he purchases the equity of redemption, there will not generally be a merger, so as to make another lien superior, unless the intention of the parties is that the two interests shall merge.[1] If in the deed taken by

& H. 662; Elliott v. Armstrong, 2 Blackf. 208; Brandon v. Brandon, 31 Law J. Ch. 47.

[6] Burrell v. Egremont, 7 Beav. 205; State v. Kock, 47 Mo. 582; Pitt v. Pitt, 22 Beav. 294; Faulkner v. Daniel, 3 Hare, 217; Redington v. Redington, 1 Ball & B. 139.

[7] Clark v. Tennison, 33 Md. 85.

[8] Sahler v. Signer, 44 Barb. 606.

[9] Denzler v. O'Keefe, 34 N. J. Eq. 361.

[1] Mallory v. Hitchcock, 29 Conn. 127; Hoppock v. Ramsey, 28 N. J. Eq. 413; Huebsch v. Scheel, 81 Ill. 281; Brooks v. Rice, 56 Cal. 428; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Mulford v. Peterson, 35 N. J. L. 127; Tower v. Devine, 37 Mich. 443; Delaware & Hudson

the mortgagee it is expressly stated that the deed is subject to the mortgage, and if subsequently the mortgagee collects part of the mortgage debt, these facts show an intention to preserve the existence of the mortgage and prevent a merger. The registration of the deed is notice of this intention to all persons subsequently dealing with the property.[2] If, in such a case, the mortgagee afterward transfers the note secured by the mortgage for the purpose of indemnifying a surety, and then executes a deed of trust upon the land, the surety can foreclose the mortgage to the amount which he was compelled to pay for his principal against a purchaser under the trust deed.[3] But where a mortgagor conveyed land to a

Canal Co. v. Bonnell, 46 Conn. 9; New Jersey Ins. Co. v. Meeker, 40 N. J. L. 18; Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290; Rogers v. Herron, 92 Ill. 583; Clos v. Boppe, 23 N. J. Eq. 270; Thompson v. Boyd, 21 N. J. L. (1 Zab.) 58; s. c. 22 N. J. L. 543; Slocum v. Catlin, 22 Vt. 137; McClaskey v. O'Brien, 16 W. Va. 791; Richardson v. Hockenhull, 85 Ill. 124; Freeman v. Paul, 3 Me. 260, 14 Am. Dec. 237; International Bank v. Wilshire, 108 Ill. 143; Andrus v. Vreeland, 29 N. J. Eq. 394; Duncan v. Smith, 31 N. J. L. 325; Fithian v. Corwin, 17 Ohio St. 117; Edgerton v. Young, 43 Ill. 464; Woodhull v. Reid, 16 N. J. L. 128; Goodwin v. Keney, 47 Conn. 486; Linscott v. Lamart, 46 Iowa, 312; Fellows v. Dow, 58 N. H. 21; Walker v. Baxter, 26 Vt. 710; Wickersham v. Reeves, 1 Iowa, 413; Dunphy v. Riddle, 86 Ill. 22. See White v. Hampton, 13 Iowa, 259; Campbell v. Vedder, 1 Abb. N. Y. App. 295; Spurgin v. Adamson, 62 Iowa, 661; Aldrich v. Blake, 134 Mass. 582; Duffy v. McGuiness, 13 R. I. 195; Scrivner v. Dietz, 84 Cal. 295; Fouche v. Swain, 80 Ala. 151; New Jersey Ins. Co. v. Meeker, 40 N. J. L. 18; Gray v. Nelson, 77 Iowa, 63; Ann Arbor Sav. Bank v. Webb, 56 Mich. 377; Linscott v. Lamart, 46 Iowa, 312; Woodward v. Davis, 53 Iowa, 694. Otherwise, however, a merger results: Beacham v. Gurney, 91 Ia. 621, 60 N. W. 187; Hudson etc. Co. v. Glencoe etc. Co., 140 Mo. 103, 41 S. W. 450, 62 Am. St. Rep. 722.

[2] Ætna Life Ins. Co. v. Corn, 89 Ill. 170.

[3] Ætna Life Ins. Co. v. Corn, 89 Ill. 170. There is no merger as to the mortgagee when it is the intention that the estates shall be kept distinct in order to protect against subsequent or intervening encumbrances or liens: Hines v. Ward, 121 Cal. 115, 53 Pac. 427; Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241. See, also, Title Guarantee Co. v. Wrenn, 35 Or. 62, 56 Pac. 271, 76 Am. St. Rep. 271; Shattuck v.

stranger who assumed and agreed to pay the mortgage, and the latter afterward conveyed the land to the mortgagee by a deed in which it was recited that the conveyance was subject to the mortgage, it was held that the mortgage became merged in the legal title, which prevented the mortgagee from maintaining an action against the mortgagor on the note, notwithstanding the fact that the value of the land at the time of the execution of the last deed was not equal to the amount of the mortgage.[4] A surrender of a defeasance and giving up the note and discharging the debt, with the intent to make the deed absolute, is a valid transaction, and the mortgagee is estopped from claiming the debt, and the mortgagor the land.[5]

§ 1326. Mortgage remaining uncanceled.—It is said that the fact that a mortgage is uncanceled of record is indicative of an intention to keep it alive.[6] A mortgaged to B an undivided fifth of land, of which B already owned three-fifths, B taking possession of the interest mortgaged, and remaining in possession till her death, but in her lifetime had acquired A's equity of redemption, and in the same year made a will in which she devised the land to C for life, and, after his death, to D. A year after the execution of her will she assigned the mortgage for value to E. After B's death, C entered into possession of the land under the devise, and was in possession of it when E brought an action to foreclose. The court held that there was no merger of the mortgage with the title obtained by B, as her assignment of the

Belknap Bank, 63 Kan. 443, 65 Pac. 643; Fitch v. Applegate, 24 Wash. 26, 64 Pac. 147; Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585.

[4] Dickason v. Williams, 129 Mass. 182, 37 Am. Rep. 316. A purchase by the mortgagee will not result in a merger so as to let in a mechanic's lien for material supplied after recordation of the mortgage: Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218.

[5] Watson v. Edwards, 105 Cal. 70. See, also, Green v. Butler, 26 Cal. 595.

[6] Hoppock's Executors v. Ramsey, 28 N. J. Eq. 413, 417.

mortgage was sufficient evidence of an intent to keep the interests distinct.[7]

§ 1327. **Ignorance of another mortgage.**—If a mortgagee who does not know of the existence of a subsequent mortgage, and does not intend to release his lien, takes a deed from the mortgagor in satisfaction of the mortgage, his mortgage is not extinguished, so as to prevent him from using it as a protection of his rights against a junior mortgage.[8] If, in satisfaction of the mortgage, an insolvent mortgagor conveys the mortgaged property to the mortgagee, not knowing that a judgment had been rendered and docketed against the mortgagor, and relying upon the latter's representation that there existed no other lien upon the property, a merger of the satisfied mortgage in the legal title will not occur, and the lien of the subsequent judgment will not be preferred to that of the mortgage. Equity will uphold and enforce the mortgage, though discharged.[9]

§ 1327a. **Mistake in satisfaction of mortgage.**—If there has been inadvertence or mistake in the satisfaction of a mortgage, a subsequent lienholder, whose rights have not been acquired after the prior mortgage has been marked satisfied, but who took his mortgage while such prior mortgage was

[7] Goodwin v. Keney, 47 Conn. 486.

[8] Rumpp v. Gerkens, 59 Cal. 496.

[9] Hines v. Ward, 121 Cal. 115, 53 Pac. 427. If the mortgagee has parted with one of the notes to a *bona fide* purchaser, the conveyance subsequently of the equity of redemption, will not cause a merger of the mortgage in the fee and the holder of the note will not be prevented from maintaining foreclosure: Cole v. Beale, 89 Ill. App. 426. See, also, as to merger: Woodside v. Lippold, 113 Ga. 877, 39 S. E. 400, 84 Am. St. Rep. 267; Brooks v. Benham, 70 Conn. 92, 39 Atl. 1112, 66 Am. St. Rep. 87; Quimby v. Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Katz v. Obenchain, 48 Or. 352, 85 Pac. 617, 120 Am. St. Rep. 821; Gleason v. Carpenter, 74 Vt. 399, 52 Atl. 966; Chase Nat. Bank v. Hastings, 20 Wash. 433, 55 Pac. 574; Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585.

in effect recorded and unsatisfied, and knowing that it was a valid lien, will not be allowed in equity to avail himself of the mistake.[1] Where a mortgage has been executed by two tenants in common to secure the purchase money, and one of them has conveyed his interest in the land to his cotenant, in consideration of the latter paying the full amount remaining due on the mortgage, and, upon payment being made, the mortgage is satisfied of record, without knowledge on the part of the person paying that his grantor had previously executed a deed of trust of his half of the land, the person paying the mortgage may maintain an action to revive it, and is entitled to be subrogated to the rights of the assignee of the mortgage as against the holder of the deed of trust.[2]

§ 1328. **Reaffimation of mortgage.**—The transaction may be such as simply to reaffirm the mortgage and extend the time of payment. For example, A mortgaged land to B to secure certain notes, and subsequently conveyed the same land to C. After this, C conveyed the land to B, but did not take up the notes of A, or obtain a discharge of the mortgage, but received from B a bond for a reconveyance of the land, when he, C, paid, in a time specified, the original notes of A secured by mortgage. B did not by this transaction, obtain an absolute title subject only to the stipulations of the bond. The mortgage was not discharged but was reaffirmed, with the time for payment extended,[3]

§ 1329. **Purchase at execution sale.**—Land upon which there was a mortgage lien prior to the entry of a judgment was sold on execution, and, before the expiration of the time for redemption, the purchaser bought and took an assignment of the mortgage and bond, foreclosed the mort-

[1] Shaffer v. McCloskey, 101 Cal. 576.

[2] Shaffer v. McCloskey, 101 Cal. 576.

[3] Bailey v. Myrick, 50 Me. 171.

gage, and became the purchaser at the foreclosure sale for a sum less than the amount due on the mortgage. In an action upon the bond for the deficiency, it was held that, until the time for redemption had expired, the purchaser acquired no title, and that his subsequent purchase of the bond and mortgage did not operate as payment of the bond.[4]

§ 1330. **Cancellation of mortgage by deed.**—Of course, where the parties intend that a deed shall cancel a mortgage, it will have this effect. But where a mortgagee received from a mortgagor a deed, which recited that the deed was made to cancel the mortgage, and an attachment made before the deed, and consummated by a levy afterward, took the land, the mortgage with the notes having remained in the possession of the mortgagee by a parol agreement to await the attachment, made at the time with the mortgagor, it was held that the deed did not discharge the mortgage.[5]

[4] Southworth v. Scofield, 51 N. Y. 513. The mortgage debt is not extinguished by a purchase of the equity of redemption by the mortgagee at a sale under execution: Lydecker v. Bogert, 38 N. J. Eq. 136. As to the right of a purchaser to have an encumbrance paid off by creditors, to give a clear title on property afterward proved to have been exempt, enforced against the property, see Beckman v. Meyer 75 Mo. 333. Where the mortgagee obtained title to the mortgaged premises by a deed from the mortgagor, the mortgage will not merge, but will be held superior to the lien of a prior purchaser under a sale on a judgment against the mortgagor junior to the mortgage: Jewett v. Tomlinson, 137 Ind. 326. The intention as to a merger controls when purchase is made at a judicial sale: Moore v. Olive, 114 Ia. 650, 87 N. W. 720.

[5] Crosby v. Chase, 17 Me. 369. Weston, C. J., in delivering the opinion of the court, said: "The certificate by the demandant, that payment had been made, may operate as a receipt, which is open to explanation. It is certainly not a paper of a higher character. The recital in the deed, that it was intended to cancel the mortgage and the notes, being accepted by the demandant, may conclude him from denying that fact. He does not now deny it, but avers truly that what was intended has failed, by reason of the prior attachment of the tenant. The supposed payment has become unavailable. He has not been permitted to realize the consideration, which he was to accept, instead of payment of the

§ 1331. **Expression of intention against merger.**—If the deed executed by the owner of the equity of redemption to the holder of the mortgage expressly declares that the intention of the parties is that, unless the grantee elects, the deed shall not operate as a merger of title, the merger which might otherwise result will be prevented.[6] Thus, where it was declared that the deed was not to operate as a merger of the title of the mortgagee under the mortgage, "only at the election of the said" grantee, it was held that the two estates would, in equity, be preserved distinct, unless it appeared that the mortgagee elected that they should be merged.[7]

§ 1332. **Comments.**—As the law of merger depends mostly, if not entirely, upon the intention of the parties, it follows that when the parties express that intention, such expression of intention must be recognized by the courts. When such intention is not expressed, the court must endeavor to ascertain it by the circumstances connected with the transaction, or must indulge in some presumption by which *prima facie* its existence is to be determined. But as was said in the chapter considering the principles by which deeds should be construed, the object of all rules is to determine what the intention of the parties was. There can be nothing for the courts to construe when the parties have themselves construed

notes in money." Equity will prevent a merger and keep the estates distinct, if from the express or implied intention of the party it appears that he so desires: Longfellow v. Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117. Doctrine of merger not favored in equity and not allowed where would work injustice: In re Washburn's Estate, 11 Cal. App. 735, 106 Pac. 415. When justice requires, a merger of legal and equitable estates will be prevented: Gleason v. Carpenter, 74 Vt. 399, 52 Atl. 966. The doctrine of merger of estates does not apply where there are equities which would be defeated thereby: Beauchamp v. Bertig, 90 Ark. 351, 23 L.R.A.(N.S.) 659, 119 S. W. 75.

[6] Wilkes v. Collin, Law R. 8 Eq. 338; Bailey v. Richardson, 9 Hare, 734; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; Tyrwhitt v. Tyrwhitt, 32 Beav. 244.

[7] Spencer v. Ayrault, 10 N. Y. 202.

in unmistakable form their own acts. As a matter of conveyancing, it may be observed, it is highly desirable to express in language everything which, if left unexpressed, may become a matter of controversy.

§ 1333. **Quitclaim deed.**—Where a person, at the mortgagor's request, or with his consent, pays the amount due upon the mortgage, it is held that a quitclaim deed to such person from the mortgagee has the effect generally of an assignment of the mortgage, and does not operate as a discharge or release of the mortgage, unless this was the manifest intention of the parties.[8] But in Minnesota, it is held that a quitclaim deed without a transfer of the note and mortgage does not operate as an assignment of the mortgage.[9] But where the owner of land executes a mortgage, and then sells the mortgaged premises to another under an agreement that the grantee shall pay the notes secured, and the mortgagee executes to the grantee a quitclaim deed of the land, the mortgage is discharged.[1]

§ 1334. **Tenants in common.**—Where there are two or more tenants in common of the equity of redemption, a mortgage is not discharged by its assignment to one of them. The assignee may foreclose the mortgage. It is to his interest that it should be kept alive as a security for the payment of whatever amount may be due as a just proportion from his cotenant, and as he is under no obligation to his cotenant, the effect of the assignment will depend upon the assignee's interest. The cotenant cannot be injured because he can redeem by the payment of his share of the mortgage

[8] Hinds v. Ballou, 44 N. H. 619; Freeman v. McGraw, 15 Pick. 82; Wolcott v. Winchester, 15 Gray, 461; Hunt v. Hunt, 14 Pick. 374, 25 Am. Dec. 400. See, also, in this connection: Quimby v. Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685.

[9] Johnson v. Lewis, 13 Minn. 364.

[1] Jerome v. Seymour, Har. (Mich.) 357.

debt, and the assignee's interest in the equity of redemption does not preclude him from holding under the mortgage title.[2] Where land is subject to a mortgage, and one of the owners pays off the mortgage by installments, and upon the payment of the last installment the mortgage is assigned to him, a merger does not result so as to give the lien of a subsequent judgment creditor of the other tenant priority over the mortgage.[3]

§ 1335. **Destruction of equitable estate.**—When the equitable estate has been extinguished, there can be no merger. An owner of land subject to a judgment lien executed a mortgage on the land, and subsequently the premises were sold upon an execution issued under the judgment. The time for redemption having expired, the assignee of the certificate of sale received a deed from the sheriff, and then conveyed the premises to the mortgagee, who had never taken any steps to effect a redemption, and the mortgagee subsequently conveyed to another. In proceedings against the latter grantee by the creditors of the original owner, it was decreed that the grantee held the title in trust for the original owner, and both were directed to convey to a receiver. An action was then brought to foreclose the mortgage, but the court held that by a failure to redeem, the title was transferred to the purchaser and all inferior liens were extinguished, and that the mortgage could not be revived as a lien by the purchase by the mortgagee of the premises. The equitable estate of the mortgagee at the time of the purchase being gone, there could be no merger.[4]

§ 1336. **Descent.**—Where a father who had given a mortgage on land to one of his children afterward died in-

[2] Barker v. Flood, 103 Mass. 474.
[3] Duncan v. Drury, 9 Pa. St. 332, 49 Am. Dec. 565.
[4] Hill v. Pixley, 63 Barb. 200.

testate, one-third of his interest passing to the mortgagee by inheritance, the mortgage held by such heir is not merged by the descent to him of the undivided one-third of the land.[5] But if a piece of land is charged with an annuity, and the person entitled to it inherits one-half of it as the heir at law of the devisee of the grantor of the annuity, it is held that by such descent one-half of the annuity becomes merged;[6] that is, the land is discharged from the payment of the annuity to the extent which the annuitant is entitled to as heir.[7]

§ 1337. **Deed for part of land.**—If a mortgagee purchases an undivided part of the mortgaged premises, and it does not appear that there is a payment or merger of the mortgage or any portion of it, the deed may have the effect of releasing from the operation of the mortgage the portion conveyed, leaving the portion unconveyed solely subject to the lien of the mortgage. The registration of the mortgage is notice to a subsequent mortgagee of the portion unconveyed, and he takes subject to the lien of the first mortgage.[8] If in a case of this kind, the subsequent mortgage is foreclosed, but the prior mortgagee is not made a party, nothing being said in the bill about the prior mortgage, a judgment in the action is not a bar to a suit by the prior mortgagee to foreclose, although he knew of the judgment and did not attempt to have it modified or vacated, when it is not shown that he was present at the sale under the judgment or knew of the manner of making the sale.[9]

§ 1338. **Two mortgages.**—Where land subject to two mortgages is conveyed to a party, and the grantee afterward

[5] Thebaud v. Hollister, 37 N. J. Eq. 402. See Carithers v. Stuart, 87 Ind. 424.

[6] Jenkins v. Van Schaak, 3 Paige, 242.

[7] Addams v. Heffernan, 9 Watts, 529. See, also, Fitzgerald v. Fitzgerald, Law R. 2 P. C. 83; Byam v. Sutton, 19 Beav. 556.

[8] Smith v. Roberts, 91 N. Y. 470, 62 How. Pr. 196.

[9] Smith v. Roberts, 91 N. Y. 470, 62 How. Pr. 196.

purchases and has assigned to him the senior notes and mortgage, a merger results, the junior mortgage becoming the first lien. Hence, the grantee cannot maintain an action to compel the junior mortgage holder to redeem from the first mortgage.[1]

§ 1339. **Possession by mortgagee.**—Although the possession of the mortgaged premises may have been delivered by the mortgagor to the mortgagee, and the land is held by the grantee of the mortgagee, yet if after the delivery of possession to the mortgagee he transfers the note, the indorsee may obtain judgment upon the note alone, and if execution is issued and levied upon the mortgaged premises, the mortgage is extinguished.[2]

§ 1340. **Prior assignee.**—Where a mortgagee has assigned the notes and mortgage to a *bona fide* purchaser, a subsequent deed from the mortgagor to the mortgagee cannot cause a merger so as to effect the rights of the assignee. If the assignment of the mortgage is recorded, a purchaser from the mortgagee, after the mortgagor's release of his equity of redemption, will take a title subject to the equitable claims of the assignee. After the assignment of the mortgage, the mortgagee ceased to be such, so that the two titles could not unite in the same person.[3]

§ 1341. **Mortgage in trust for married woman.**—If the trustee does not consent, a mortgage in trust for the separate estate of a married woman is not extinguished by the execution of a deed to her of the mortgaged premises. A husband who was indebted to his wife for money from her

[1] Byington v. Fountain, 61 Iowa, 512. But see under the facts of the case the decision in Spurgin v. Adamson, 62 Iowa, 661.

[2] Lord v. Crowell, 75 Me. 399.

[3] International Bank of Chicago v. Wilshire, 108 Ill. 143.

separate estate, executed a mortgage on real estate belonging to him to a trustee in trust for her, and a few days later gave a judgment to his partner as security. Subsequently both husband and wife executed a deed of the mortgaged premises, subject to the mortgage to A, and he shortly afterward executed a deed of the same land to the wife on the same terms, and the husband and wife then joined in a mortgage to B, as security for money borrowed by the husband, B, at the same time, taking an assignment from the trustee of the wife's mortgage and a release from the partner of the priority of his lien. The land having been sold under the trustee's mortgage, the deed to the wife of the mortgaged premises was held not to extinguish the mortgage which the trustee held in trust for her, the trustee not being a party to it, an intent to keep the mortgage in existence appearing upon the face of the deed, and this result was for her interest.[4] Where a trustee holds land in trust for a married woman, and, on paying a mortgage on the land, given by her and her husband before the trust deed to him, has the mortgage assigned to him, and subsequently, in compliance with her request, conveys the land subject to the mortgage, and assigns the mortgage at the same time to the grantee, no merger of the mortgage in the trustee's interest results, and hence, judgments recovered against him prior to his conveyance of the land are not liens on it.[5]

§ 1342. **Reliance upon record.**—As has been explained, the question of merger is one determined in a great measure

[4] Hatz's Appeal, 40 Pa. St. 209.

[5] Denzler v. O'Keefe, 34 N. J. Eq. (7 Stewt.) 361. Where a deed is executed by the mortgagor to the mortgagee, and the latter, at the same time and as part of the same transaction, executes a deed to the wife of the mortgagor, the deeds being made without consideration and for the sole purpose of conveying the title to the wife, the mortgage is not merged in the title acquired by the mortgagee, and is not extinguished: **McCrory v. Little,** 136 Ind. 86.

by the intention of the parties. Reliance cannot be placed upon the record for the purpose of showing merger.[6] A party who takes a deed upon the assumption that there has been a merger of a former mortgage to his grantor, in a subsequent conveyance of the land, acts at his own peril. He has notice that some one holds the mortgage as an existing lien, and, unless the mortgagee is still the owner of the mortgage, the grantee takes subject to it.[7] In a case in Wisconsin the court considered the question of merger, quoting with approval the language of the Master of the Rolls, Sir William Grant, that the question is "upon the intention, actual or presumed, of the person in whom the interests are united," and adds: "Such being the law, it seems very clear that it was the duty of the trustees, if they desired that the trust deed should be unaffected by the plaintiff's mortgage, to go beyond the record in the register's office (for such record was notice to them of the mortgage), and to ascertain from other sources whether there had been a merger in fact. They should have required their grantor (if it could) to produce the mortgage and the note which it was given to secure, and to deliver them up, or, at least, to produce the securities and discharge the mortgage of record. The inability of the grantor to do so would be sufficient to charge the trustees with notice that the security had been assigned, and the failure to call upon the grantee to do so is sufficient to charge them with laches. Briefly stated, the case seems to be this: When the trust deed was executed, under which the appellant makes its title to the land in controversy, the plaintiff's mortgage was of record in the proper office, and the trustees had, at least, constructive

[6] Oregon and Washington Trust Investment Co. v. Shaw, 5 Saw. 336; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Aiken v. Milwaukee & St. P. R. R. Co., 37 Wis. 469; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Morgan v. Hammett, 34 Wis. 512; Chase v. Van Meter, 140 Ind. 321, 39 N. E. Rep. 455.

[7] Oregon and Washington Trust Investment Co. v. Shaw, 5 Saw. 336.

notice of its existence. There was nothing of record to show that the debt which it was given to secure had been paid, and nothing which could affect the mortgage, except the registry of the conveyance to the mortgagee of the equity of redemption. The record did not show whether such conveyance operated as a merger of the mortgage interest in the land, or otherwise. Further investigation was necessary to determine that fact, and the means of determining it were at hand. The trustees failed to push their inquires beyond the registry. They failed to ascertain (as they easily might have done) whether the two estates were, in fact, united in their grantor, and if so, whether the latter elected to preserve the mortgage interest. Using no diligence in that behalf, they took their conveyance at their peril of the fact. It turns out that there has been no merger; that the mortgage interest is still subsisting, and because of priority of execution, and registry, such interest is paramount to that of the appellant in the mortgaged premises." [8] If a mortgagee assigns the mortgage, and if subsequently the mortgagor conveys the mortgaged estate to the mortgagee, the assignee of the mortgage has a valid lien on the property as against a person purchasing from such mortgagee, without knowledge of the assignment. The fact that, prior to the registration of the assignment, the conveyances to the mortgagee, and from him to the purchaser, were both placed on record, cannot alter this rule. The records can only show what was done. They cannot show what the parties intended when not expressed. The assignee stands in the place occupied by the mortgagee at the time of the assignment. If the mortgage was a valid lien at that time, it does not lose its validity because subsequently the mortgagor conveys the property to the mortgagee. A purchaser cannot assume without inquiry that the mortgage has been satisfied.[9]

[8] Aiken v. Milwaukee & St. Paul R. R. Co., 37 Wis. 469, per Lyon, J.

[9] Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

Mr. Justice Sutherland said that independently of the recording act, it would be wholly immaterial whether the purchaser had or had not notice of the mortgage, or whether the deed to the purchaser was voluntary, or for a valuable consideration. "Is this not too plain to require an illustration? A sells and conveys land to B. B gives back a bond and mortgage for the purchase money. A sells and assigns the bond and mortgage to C, and afterward receives a conveyance of the equity of redemption from B, and then by a full covenant deed, conveys the land and all his estate and interest in the land to D. Now, the conveyances, and the bond and mortgage, and their assignment, being left to their common-law force and effect, does not D, irrespective of any recording act, necessarily take his conveyance subject to C's mortgage? *Could* A convey to D any more than the equity of redemption? Could his conveyance to D impair, or in any way affect, C's mortgage debt, or mortgage security? Or is there, or can there be, independent of the recording act, as between C and D, any material question of good faith, or of notice, or even as to the consideration of D's conveyance? Is it, or can it be at all, material as between C and D, irrespective of the recording act, whether D did or did not pay a valuable consideration for his conveyance, or whether he had, or had not notice of C's mortgage? Of course not. It is almost absurd to state these questions; and certainly, their statement furnishes their answers. Nay, further, no ingenious use of words, or plausible suppositions, or imperfect and deceptive analogies, can show, with the recording act in full force and in view, that A's conveyance to D did, or could, in fact, *of itself or by itself,* carry or convey anything but the equity of redemption, for he in fact had nothing else to convey, and it is even beyond legislative power, however omnipotent, to enable a person to actually convey that which he has not. And of course, A's deed to D did not, and could not, of itself or by itself, as *the act or deed of A merely,* with or

without the recording act, operate as an assignment of C's bond or mortgage, his mortgage debt, or mortgage security, lien, or interest in the land." [1] The principle that a merger

[1] Purdy v. Huntington, 42 N. Y. 334, 345, 1 Am. Rep. 532. There is no merger when such is contrary to the intention of the parties: Security Title etc. Co. v. Schlender, 190 Ill. 609, 60 N. E. 584; Farrend v. Long, 184 Ill. 100, 56 N. E. 313; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; McCrory v. Little, 136 Ind. 86, 35 N. E. 836; Aldrich v. Blake, 134 Mass. 582; McElhaney v. Shoemaker, 76 Iowa, 416, 41 N. W. 58; Shattuck v. Belknap Sav. Bank, 63 Kan. 443, 65 Pac. 443; Quick v. Raymond, 116 Mich. 15, 74 N. W. 189; Ames v. Miller, 65 Neb. 204, 91 N. W. 250; Harron v. DuBois, 64 N. J. Eq. 657, 54 Atl. 857; Continental Title Co. v. Devlin, 209 Pa. St. 380, 58 Atl. 843; Carrow v. Headley, 155 Pa. St. 96, 25 Atl. 889; Belknap v. Dennison, 61 Vt. 520, 17 Atl. 738; C. M. Hapgood Shoe Co. v. Crockett First Nat. Bank, 23 Tex. Civ. App. 506, 56 S. W. 995; Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501; Gilchrist v. Foxen, 95 Wis. 428, 70 N. W. 585. The legal and equitable estate should unite in the same person in the same right: Butler v. Ives, 139 Mass. 202, 29 N. E. 654; Bush v. Herring, 113 Iowa, 158, 84 N. W. 1036; Rowse v. Johnson, 66 Mo. App. 57. Where there is a merger the debt is extinguished except in cases of fraud where a redemption will be permitted: Noble v. Graham, 140 Ala. 413, 37 So. 230; Harris v. Masterson, 91 Tex. 171, 41 S. W. 482; Goodell v. Dewey, 100 Ill. 308. Where injustice to the mortgagee would result a merger will not be declared: Farran v. Long, 184 Ill. 100, 56 N. E. 313; Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864; Watson v. Gardner, 119 Ill 312, 10 N. E. 192; Lowman v. Lowman, 118 Ill. 582, 9 N. E. 245; Gresham v. Ware, 79 Ala. 192; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782; Watson v. Dundee Mort. etc. Co., 12 Or. 474, 8 Pac. 548; Boardman v. Larrabee, 51 Conn. 39; Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566; Colby v. McOmber, 71 Iowa, 469, 32 N. W. 459; Keith v. Wheeler, 159 Mass. 161, 34 N. E. 174; Oak Creek Valley Bank v. Helmer, 59 Neb. 176, 80 N. W. 891. The recording of the deed does not of itself determine the question of merger: Chase v. Van Meter, 140 Ind. 321, 39 N. E. 455. The existence of a merger is rebutted by the fact that the mortgagee retains the evidence of the indebtedness, or assigns it as an outstanding obligation: Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Dunphy v. Riddle, 86 Ill. 22; Quimby v. Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. Rep. 685; Gibbs v. Johnson, 104 Mich. 120, 62 N. W. 145; Goodwin v. Keney, 47 Conn. 486; Peterborough Sav. Bank v. Pierce, 54 Neb. 712, 75 N. W. 20. There will be no merger where it is necessary to keep the mortgage alive to protect the mortgagee against subsequent incumbrances:

will result where the legal and equitable titles have become centered in the same person is not one to be enforced in all cases, but it is intended by equity to work justice, and hence, when injustice would result if it should be declared that the legal and equitable estates have become merged, equity will, keep them separate and distinct.

§ 1343. **Married women.**—Where statutes protecting the rights of married women prevail, the marriage of a woman with the mortgagor does not extinguish a mortgage held by her before marriage.[2] Nor, under such statutes, is an assignment of a mortgage to the wife of the mortgagor a discharge of the lien.[3] A mortgagor may purchase a mortgage executed by himself and wife on property belonging to her. It is a valid security in the hands of the mortgagor, as well as in the hands of an assignee. It cannot be declared satisfied in the hands of the assignee, because the consideration was paid by the mortgagor, and it cannot be said that the assignee holds the mortgage for the use of the mortgagor.[4]

Davis v. Randall, 117 Cal. 12, 48 Pac. 906; Hines v. Ward, 121 Cal. 115, 53 Pac. 427; Lowman v. Lowman, 118 Ill. 582, 9 N. E. 45; Rogers v. Herron, 92 Ill. 583; Cohn v. Hoffman, 45 Ark. 376; Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057; Jewett v. Tomlinson, 137 Ind. 326, 36 N. E. 1106; Kilmer v. Hannifan, 113 Iowa, 281; Smith v. Swan, 69 Iowa, 412, 29 N. W. 402; Seiberling v. Tipton, 113 Mo. 373, 21 S. W. 4; Wilson v. Vanstone, 112 Mo. 315, 21 S. W. 4; Kennedy v. Roundtree, 63 S. C. 395, 41 S. E. 477; Gleason v. Carpenter, 74 Vt. 399, 52 Atl. 966; Belknap v. Dennison, 61 Vt. 520, 17 Atl. 738; Hitchcock v. Nixon, 16 Wash. 281, 47 Pac. 412. Where the mortgagee has transferred the mortgage, a subsequent conveyance to him does not create a merger: Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; Durham v. Craig, 79 Ind. 117; Chicago International Bank v. Weekshire, 108 Ill. 143; Buchanan v. International Bank, 78 Ill. 500; Lime Rock Nat. Bank v. Mowry, 66 N. H. 598, 13 L.R.A. 294, 22 Atl. 555.

[2] Power v. Lester, 23 N. Y. 527. See Gillig v. Maass, 28 N. Y. 191.

[3] Bemis v. Call, 10 Allen, 512; Model Lodging House Association v. Boston, 114 Mass. 133; Bean v. Boothby, 57 Me. 295.

[4] Faulks v. Dimock, 27 N. J. Eq. 65.

§ 1344. **Deed to sureties.**—An owner of land executed a mortgage to A and B to indemnify them against liability on a note made by the owner to a bank, the mortgage containing a power of sale to be exercised by the mortgagees, or the survivor, or his representatives, upon default, for breach of the condition which included the payment of the note by the principal to the holder. The mortgagor subsequently executed a quitclaim deed to A and B, and they executed a bond for reconveyance within a specified time upon the performance of certain conditions, but the mortgagor never complied with the conditions of the bond which was not recorded. The quitclaim deed, however, was placed on record, as was also the mortgage, which by the original agreement of the parties was delivered to the bank. Several portions of the mortgaged premises were afterward sold with warranty. Some of these sales were authorized by the bank, and others were assented to after they had been made. But in all cases payment of sums in sufficient amount upon the mortgage were made to the bank, upon which payment receipts were given. A died first, and after B's death his administrator paid one-half of the amount due on the note, upon the agreement that it was to be "in full payment of claim on said note, provided the balance due on the note be paid by estate of A, or by anyone for said estate or for themselves," the balance, however, not being paid. A bill in equity was filed to have the mortgage declared of no validity, and to enjoin B's administrator from selling the mortgaged premises to pay the balance still due. The fact was, as the court found, that the quitclaim deed was not intended by the parties to cause a merger of title, and hence the bill was held not to be maintainable.[5]

[5] Aldrich v. Blake, 134 Mass. 582. "When so definite and important an interest," said Devens, J., "had been created in the mortgage in favor of the bank, there could be no union of titles which could operate to exclude it by the act of the mortgagor and mortgagees, or their

§ 1345. **Payment by party bound.**—Where an assignment after payment is made to a party bound by contract to pay the debt, the debt is generally held to be discharged. The rule is thus stated: "If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release, and not an assignment, although in form it purports to be an assignment. When no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties; and their respective interests in that subject will have a strong bearing upon the question of such intent."[6] Where payments are made by a party in pursuance of his duty, they must be applied as payments, and cannot be claimed by such party as a part consideration for the assignment of the mortgage to another.[7] When land is subject to a mortgage, a purchaser who has assumed and agreed to pay the mortgage, pays and

assigns. There was a trust created in its favor as the payee of the note, which was imposed upon the sureties, Otis D. and Warren J. Ballou, and they held the mortgaged property subject to this trust. It being clearly expressed in the mortgage, when this was recorded, constructive notice of its existence was given to all, so that attaching creditors, even if they found that there had been a subsequent quitclaim deed of the granted premises to the mortgagees, would be fully informed that they would of necessity hold them subject thereto."

[6] Brown v. Lapham, 3 Cush. 551. See Bemis v. Call, 10 Allen, 512; Strong v. Converse, 8 Allen, 557, 85 Am. Dec. 732; Butler v. Seward, 10 Allen, 466; Burnham v. Dorr, 72 Me. 198; Wadsworth v. Williams, 100 Mass. 126; Ryer v. Gass, 130 Mass. 227; Lappen v. Gill, 129 Mass. 349.

[7] Burnham v. Dorr, 72 Me. 198. And see, Johnson v. Webster, 4 De Gex, M. & G. 474; Otter v. Vaux, 2 Kay & J. 650, 6 De Gex, M. & G. 638. Where land is bought by a partnership, assuming the payment of a mortgage on it, and the mortgage is foreclosed for nonpayment, a purchase at the mortgage sale by one of the partners will not entitle him to a deed. His purchase is only a satisfaction of the mortgage: Freeman v. Moffit, 119 Mo. 280.

discharges the mortgage, when he takes an assignment of it, so far as the liability of his grantor is concerned.[8]

§ 1346. **Covenant against encumbrances.**—Where land is sold with a covenant of warranty against encumbrances, the grantor, in case he takes an assignment of a mortgage outstanding on the same land, holds it for the benefit of the grantee.[9] The grantor acquires title not merely by way of estoppel against the grantor, but as a positive confirmation of his title. The subsequent purchase by the grantor is presumed to have been made in the performance of his duty to the grantee to perfect his title, and this presumption is in-

[8] Putman v. Collamore, 120 Mass. 454; Mickles v. Townsend, 18 N. Y. 575; Tucker v. Crowley, 127 Mass. 400; Winans v. Wilkie, 41 Mich. 264; Frey v. Vandehoos, 15 Wis. 397; Thompson v. Heywood, 129 Mass. 401; Russell v. Pistor, 7 N. Y. 171, 57 Am. Dec. 509; Willson v. Burton, 52 Vt. 394; Coles v. Appleby, 22 Hun, 72; Burnham v. Dorr, 72 Me. 198; Lilly v. Palmer, 51 Ill. 331. And see Hall v. Harrington, 41 Mich. 146; Campbell v. Knights, 24 Me. 332; Strong v. Converse, 8 Allen, 547, 85 Am. Dec. 732; Pike v. Goodenow, 12 Allen, 472; Dollar Savings Bank v. Burns, 87 Pa. St. 491. And see Atkinson v. Angert, 46 Mo. 515; McCabe v. Swap, 14 Allen, 188; McMahon v. Russell, 17 Fla. 698; Norris v. Morrison, 45 N. H. 490; Russell v. Austin, 1 Paige, 192; Savage v. Hall, 12 Gray, 363; Hartshorne v. Hartshorne, 2 N. J. Eq. (1 Green) 349; Farwell v. Cotting, 8 Allen, 211; Gibson v. Crehore, 3 Pick. 474; Jones v. Bragg, 33 Mo. 337, 84 Am. Dec. 49; Sargent v. Fuller, 105 Mass. 119.

[9] Mickles v. Townsend, 18 N. Y. 575; Collins v. Torrey, 7 Johns. 278, 5 Am. Dec. 273. For discussion of a deed as a merger of preliminary agreements relating thereto see Section 850 a et. seq. ante, and note also in that connection the following cases: Beasley v. Phillips, 20 Ind. App. 182, 50 N. E. 488; West etc. Co. v. Bayles, 80 Md. 495, 31 Atl. 422; Slocum v. Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499; Griswold v. Eastman, 51 Minn. 189, 53 N. W. 542; Horner v. Lowe, 159 Ind. 406, 64 N. E. 218; Hampe v. Higgins, 74 Kan. 296, 85 Pac. 1019; Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145; Refining Co. v. Refining Corp. (Va.) 64 S. E. 56; Savage v. Cauthorn (Va.) 64 S. E. 1052; Butts v. Smith, 121 Wis. 566, 99 N. W. 328, 105 Am. St. Rep. 1039; Portsmouth etc. Co. v. Oliver, etc. Co., 109 Va. 513, 64 S. E. 56, 132 Am. St. Rep. 924 citing text sec. 850a.

controvertible. If, after the grantor has thus taken an assignment of a mortgage, he assigns it to another, the latter takes it subject to all equities that exist between the grantee and grantor. In other words, the purchaser acquires no lien on the land. It is the purchaser's duty, when the grantee is in possession, or his deed is recorded, to ascertain the equities of the grantee.[1] Where the same person has executed two mortgages upon the same land to different mortgagees with covenants of warranty, a redemption of the first mortgage cannot give the mortgagor the position of an equitable assignee.[2]

[1] Mickles v. Townsend, 18 N. Y. 575.

[2] Butler v. Seward, 10 Allen, 466. See, also, Tyler v. Lake, 4 Sim. 351; Stoddard v. Rotton, 5 Bosw. 378; Fish v. Gordon, 10 Vt. 288; Tucker v. Crowley, 127 Mass. 400.

CHAPTER XXXVIII.

TAX DEEDS.

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§ 1347. **Scope of chapter.**—It was our intention originally to treat of nothing but the voluntary alienation of title. But questions involving the requisites of tax deeds come so frequently before the courts, that it seems desirable, in a treatise devoted to a discussion of the law of deeds, some attention should be given to this subject. It would be impracticable to enter into an exhaustive treatment of the law of taxation, or of all the matters resulting eventually in a sale of land for taxes, and the issuance, after the expiration of the statutory time for redemption of a deed. The validity of a tax deed depends, to a great extent, upon the regularity of antecedent proceedings, the assessment, listing, and other matters required by law, before the tax levy is actually made. An exhaustive or even a cursory examination of such matters would require more space than could be devoted to them in a treatise not confined to a consideration of the law of taxation alone. In this chapter the important principles applicable to the tax deed as an instrument of conveyance, and the method and requisites of a tax sale, are discussed in such a manner as seemed proper in a treatise involving originally the law of a voluntary transfer of title. For other questions con-

nected with the exercise of the power of taxation, reference should be had to the many valuable works, confined exclusively to a consideration of that subject. Therefore, in this chapter we shall treat of the deed itself, and of such matters only as are intimately connected with it.

§ 1348. Validity dependent upon antecedent proceedings.—A tax deed, as a general proposition, depends upon the regularity and correctness of the preceedings leading up to it. Aside from some positive provision of the statute, there is no presumption that the requirements of the law in relation to the assessment, levy, and collection of taxes have been complied with. Even when by statute the recitals of the deed are made *prima facie* evidence of the facts recited, yet when it is shown that there has been a failure to comply with some essential step in the proceedings, the *prima facie* character of the deed is overthrown.[1] Where a city lot, owned and occupied as a single lot, is in the assessment arbitrarily divided, one part being assessed to the owner and another part to unknown owners, the assessment to the unknown owners is illegal. The illegality of the assessment overthrows the *prima facie* evidence of title supplied by the recitals of the tax deed, made under a sale of property assessed in this manner.[2] "The assessor is nowhere authorized," said Mr.

[1] Bidleman v. Brooks, 28 Cal. 72; Rayburn v. Kuhl, 10 Iowa, 92; Fitch v. Casey, 2 Greene G. 300; Johnson v. Elwood, 53 N. Y. 435; Sibley v. Smith, 2 Mich. 486; Orton v. Noonan, 5 Wis. 672; Delaplaine v. Cook, 7 Wis. 44; Graves v. Bruen, 11 Ill. 431; Ray v. Murdock, 36 Miss. 692; Biscoe v. Coulter, 18 Ark. 423. See People v. Doe, 31 Cal. 220; Norris v. Russell, 5 Cal. 249.

[2] Bidleman v. Brooks, 28 Cal. 72. It is held that conferring power to levy taxes and sell land for nonpayment of taxes does not carry with it power to convey the land after the sale, but the power to execute a deed must be expressly given: Knox v. Peterson, 21 Wis. 247; Smith v. Todd, 55 Wis. 459; Doe v. Ohunn, 1 Blackf. 336. See, also, Sibley v. Smith, 2 Mich. 487. But see Farrar v. Eastman, 5 Me. 345; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447. While the matter is generally provided for by statute, the general rule is that the officer

Justice Sawyer, "to arbitrarily divide up lots in strips to suit his caprice, and assess such several portions separately. If he may divide up a lot of well-known boundaries into strips twenty feet wide, he may divide it into strips of one foot in width, or even smaller dimensions, and assess each separately, and thus render it not only greatly inconvenient and oppressive to the owner, but almost impossible for him to ascertain whether his taxes have all been paid or not. The law undoubtedly contemplates that each lot of well-known dimensions and boundaries shall be assessed as one lot. In this instance, there was a lot of the ordinary dimensions—the smallest of the lots as originally officially surveyed and platted in that part of the city—which had not been subdivided by the owner. It was enclosed by a single fence, separating it distinctly from all other lands, and had a dwelling-house and outbuildings upon it, the whole openly and notoriously occupied as a single lot or messuage by the defendant's tenant and his family. Yet it was arbitrarily sliced up into at least three parts, and each separately assessed as a distinct lot, the larger portion—more than half—being assessed to the real owner, the defendant, and the other two parcels to unknown owners. Such an assessment of a tract of land constituting one well-known lot, and actually occupied as such —if it would not necessarily have such an effect—would be very likely to mislead the owner, and result, as in this instance, in a sale of his property. The owner calls to pay his taxes. A list of all the taxes against him is furnished. Upon looking it over he finds a lot in a certain locality taxed to him, and without scrutinizing the boundaries very closely, he naturally concludes that the whole lot is assessed to him, as it should be, pays taxes, and rests in security, till several

who made the sale cannot execute a deed after the expiration of his term of office, but the deed should be made by the one holding the office at the time at which the deed should be made: Donnell v. Bellas, 34 Pa. St. 157; Hoffman v. Bell, 61 Pa. St. 444; Den v. Allen, 67 N. C. 346; Cuttle v. Brockway, 32 Pa. St. 45.

years afterward he finds that a small strip has been, in fact, assessed to unknown owners, and without his knowledge or fault, sold. Such would be the inevitable result if such a system of assessment were tolerated. The object of levying taxes is to secure revenue for the purposes of the government, and not by deceptive assessments to entrap the unwary into the loss of their lands. In cases where it is difficult to ascertain whether a tract of land has been divided into smaller lots or not, it might not be proper to scrutinize the acts of the assessor too rigidly, if it can be seen that no injury could result; but the assessment of a single lot notoriously occupied as this was, the greater part to the owner, and smaller portions to unknown owners, is a gross violation of both the letter and the spirit of the law, and, if upheld, would lead to great abuses and injustice. It is, to our minds, highly probable that the assessment in question did, in fact, mislead the defendant, and that the sale of the property was the result of this misapprehension. At all events, he was liable to be thus misled to his injury. The assessment being illegal, the *prima facie* case made by the tax deeds, conceding them to be sufficient in form, is overthrown." [3] All the various acts required to be performed must be complied with before the title will pass. All of the provisions of the statute must be strictly observed.[4] Where there is no statutory provision laying down

[3] In Bidleman v. Brooks, 28 Cal.

[4] Pope v. Hedden, 5 Ala. 433; Taylor v. French, 19 Vt. 49; Morris v. Crocker, 4 La. 147; Judevine v. Jackson, 18 Vt. 470; Millikan v. Patterson, 91 Ind. 515; Lessee of Perkins v. Dibble, 10 Ohio, 433, 36 Am. Dec. 97; Brown v. Dinsmoor, 3 N. H. 103; Carlisle v. Longworth, 5 Ohio, 229; Ronkendorff v. Taylor, 4 Peters, 349, 7 L. ed. 882; Langdon v. Poor, 20 Vt. 13; State v. Mayor etc., 36 N. J. L. 191; Irving v. Brownell, 11 Ill. 402; Brooks v. Rooney, 11 Ga. 427, 56 Am. Dec. 430; Early v. Doe, 16 How. 610, 14 L. ed. 1079; Foust v. Ross, 1 Watts & S. 501; Matthews v. Light, 32 Me. 305; O'Brien v. Coulters, 2 Blackf. 421; Lane v. Bommelmann, 21 Ill. 143; McDonough v. Gravier, 9 La. 546; Lake County v. Sulphur Bank etc. Co., 66 Cal. 17; Lagroue v. Rains, 48 Mo. 536; Williams v. Peyton, 4 Wheat. 77, 4 L. ed. 518; Hill v. Leonard, 4 Scam. 140; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec.

a rule of evidence there is no presumption of any kind in favor of the regularity of any of the proceedings.

§ 1349. **Rule of caveat emptor.**— The rule of *caveat emptor* applies strictly to a purchaser at a tax sale. If the assessment is so defective that the purchaser acquires no title at the tax sale, he cannot maintain an action against

216; Wilsons v. Bell, 7 Leigh, 22; Carpenter v. Sawyer, 17 Vt. 121; Burch v. Fisher, 13 Serg. & R. 208; Dentler v. State, 4 Blackf. 258; Carmichael v. Aikin, 13 La. 205; Gaylord v. Scarff, 6 Clarke, 579; Abbott v. Doling, 49 Mo. 302; Yankee v. Thompson, 51 Mo. 237; Schenck v. Peay, 1 Woolw. 175; Alvord v. Collin, 20 Pick. 418; Holbrook v. Dickinson, 46 Ill. 285; Jackson v. Shepard, 7 Cowen, 88, 17 Am. Dec. 502; Boisgerard v. Johnson, 23 Miss. 122; Charles v. Waugh, 35 Ill. 315; Adriance v. McCafferty, 2 Rob. (N. Y.) 153; Sumner v. Sherman, 13 Vt. 609; Porter v. Whitney, 1 Greenl. 306; Bishop v. Lovan, 4 Mon. B. 116; Brown v. Veazie, 27 Me. 95; Isaacs v. Wiley, 12 Vt. 677; Nalle v. Fenwick, 4 Rand. 585; Thames Manuf. Co. v. Lathrop, 7 Conn. 550; Shimmin v. Inman, 26 Me. 228; Yancy v. Hopkins, 1 Munf. 419; Scales v. Alvis, 12 Ala. 617, 46 Am. Dec. 269; Doughty v. Hope, 3 Denio, 595; Smith v. Bodfish, 27 Me. 295; Varick v. Tallman, 2 Barb. 113; Fitch v. Casey, 2 Greene G. 300; Blakeney v. Ferguson, 3 Eng. 277; Bussey v. Leavitt, 3 Fairf. 378; Fitch v. Pinckard, 4 Scam. 69; Greene v. Lunt, 58 Me. 532; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Garrett v. Wiggins, 1 Scam. 335; Brady v. Offut, 19 La. Ann. 184; Hubbell v. Weldon, Hill & D. 133; Graves v. Bruen, 11 Ill. 437; Yeuda v. Wheeler, 9 Tex. 408; Hadley v. Tankersley, 8 Tex. 12; Altes v. Hinckler, 36 Ill. 265, 85 Am. Dec. 406; Davis v. Farnes, 26 Tex. 296; Young v. Martin, 2 Yeates, 312; Morton v. Reed, 6 Mo. 74; Farnum v. Buffum, 4 Cush. 267; Register v. Bryan, 2 Hawks, 17; Parker v. Rule, 9 Cranch, 64, 3 L. ed. 658; Keene v. Houghton, 19 Me. 368; Hobbs v. Clements, 32 Me. 67; Cushing v. Longfellow, 26 Me. 306; Matthews v. Light, 32 Me. 305; Richardson v. Dorr, 5 Vt. 9; Taylor v. French, 19 Vt. 49; Brown v. Smith, 1 N. H. 36; Chandler v. Spear, 22 Vt. 388; Delogny v. Smith, 3 La. 418; Spear v. Ditty, 8 Vt. 419; Jackson v. Esty, 7 Wend. 148; Mason v. Fearson, 9 How. 248, 13 L. ed. 125; Wistar v. Kammerer, 2 Yeates, 100; Isaacs v. Shattuck, 12 Vt. 668; Hall v. Collins, 4 Vt. 316; Culver v. Hayden, 1 Vt. 359; Bellows v. Elliott, 12 Vt. 569; Carpenter v. Sawyer, 17 Vt. 121; Brown v. Wright, 17 Vt. 97, 42 Am. Dec. 481. The abbreviation "dolls." is equivalent to the word "dollars" in an assessment: Salisbury v. Shirley, 66 Cal. 223.

the county for the recovery of the amount paid by him.[5] An agreement made at the time the sale occurs by the board of supervisors of a county to refund the money paid, in case the sale should prove defective, is void. Such an agreement it *ultra vires*.[6] In a case in Maryland, the city collector of Baltimore sold a house and lot for the nonpayment of a tax. The purchaser paid the money, received a deed from the collector, and entered into possession. Subsequently the owner recovered the property, on the ground that the required notice had not been given. The purchaser brought an action to recover damages from the collector, but the court held that it was his duty to inquire whether or not the collector in selling the property had acted in conformity with law.[7]

[5] Loomis v. County of Los Angeles, 59 Cal. 456; McWhinney v. City of Indianapolis, 98 Ind. 182; City of Logansport v. Humphrey, 84 Ind. 467.

[6] Hyde v. Supervisors, 43 Wis. 129; City of Logansport v. Humphrey 84 Ind. 467.

[7] Hamilton v. Valiant, 30 Md. 139. Mr. Justice Brent, in delivering the opinion of the court, said: "Although cases are numerous in which titles derived from tax sales have been declared to be defective because of irregularities, we know of no case in which the attempt has been made to hold the officer making the sale responsible in damages. There seems to have been a general acquiescence in the doctrine that no such liability exists, and we had not supposed that any doubt was entertained upon so plain a proposition. A purchaser at a tax sale buying, as he does, property from a person who is not the owner of it, comes strictly and rigidly within the rule of *caveat emptor*. While his title mainly depends upon the regularity of the proceedings of the officer who makes the sale, he is bound to inquire whether he has acted in conformity with the law from which his power is derived. In this case the duties of the collector as to notice and other matters essential to the validity of a tax sale were distinctly prescribed, and in regard to them a purchaser had the easy means of being fully informed. If he acted without proper inquiry and care, it was his own fault, and, buying upon the faith of his own judgment, he must abide the consequences. The law is well settled that all the acts and proceedings *in pais* of an officer selling land for taxes from an important element in the title of the purchaser. His deed depends for its validity upon proof that the requisites of the law, subjecting it to be sold for taxes, have been complied with. A party claiming under such a deed is as much bound to prove them as he would any

§ 1350. **Purchase not a contract.**—In all the proceedings for the collection of taxes, no element of contract, agreement, or consent enters. The proceeding is one *in invitum*. The taxpayer remains passive and consents to nothing. He has a right to demand that for each step taken by the officers full authority shall be shown. If a tax deed is void for the reason that there is a patent ambiguity in the description of the land, the purchaser cannot come into a court of equity to have the assessment-roll rectified, for the purpose of charging the land with a lien for the taxes paid by him in the purchase deed afterward, on the ground that the description was founded upon the list returned to the assessor by the owner, and that such return was equivalent to an agreement that the land should be assessed by that description, and that the error in the description was caused through the fraud, mistake, or ignorance of the owner.[8] In a case in Massachusetts, Mr. Justice Hoar very clearly states the rule: "There is a plain distinction between the right of a person to recover from the town the amount of a tax unlawfully assessed upon him, and the claim of the purchaser, under a collector's deed, whose title proves defective. The town is not a party to the deed. The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed that the town has. He buys a title with-

matter of record on which his title depends. He is required to preserve the evidence of them as he would any other muniment of title, and cannot be regarded in law as without fault and without laches if he fails to examine into their regularity before he becomes a purchaser. The appellant either became the purchaser of the property in question, with a knowledge that the appellee had failed in the proper discharge of his duty by the omission to give the required notice, or was himself guilty of negligence in buying without inquiry and examination. In either aspect he will not be regarded in law as an innocent sufferer, blameless of having brought upon himself by want of proper care and diligence, the very wrong of which he complains." See, also, Casselbury v. Pascataway, 43 N. J. 353; Sullivan v. Davis, 29 Kan. 28.

[8] Cogburn v. Hunt, 56 Miss. 718.

out warranty, except such covenants as he takes from the collector, and he must rely only upon them. Beyond those covenants, his deed is in the nature of a mere quitclaim, for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent, or with any contract, express or implied, to reimburse him if his bargain proves a losing one. Where there it no fraud or imposition, the sale of land without warranty creates no obligation to return the purchase money in any event." [9] The holder of a tax title cannot assail the consideration or good faith of a deed appearing in the chain of title of the owner.[1] Nor can he question the title of the owner as obtained by fraud or without consideration,[2] while a tax sale gives a complete title and supercedes other titles,[3] and is a new title.[4] The purchaser's rights cannot be superior to those of the state and he can acquire no right if the state has no valid charge on the land.[5] The rights of the purchaser are measured by the statute and he obtains no title until the expiration of the period of redemption.[6] A sale for taxes cannot have the effect of transferring to the purchaser more land than that owner by the taxpayer. [7] In the case of a judgment and a sale based upon it, only the title and interest of the defendants in the action are conveyed to the purchaser.[8] The rights of a purchaser are not affected by a subsequent repeal of the statute in force at the time of

[9] In Lynde v. Inhabitants of Melrose, 10 Allen, 49. And see Jenks v. Wright, 61 Pa. St. 410; Coxe v. Deringer, 78 Pa. St. 271.

[1] Carthers v. Weaver, 7 Kan. 110.

[2] Clark v. Sexton, 122 Iowa, 310, 98 N. W. 127.

[3] Sinclair v. Learned, 51 Mich. 535, 16 N. W. 672; Westbrook v. Miller, 64 Mich. 129, 30 N. W. 916.

[4] Emery v. Boston Terminal Co., 178 Mass. 172, 59 N. E. 763, 86 Am. St. Rep. 473.

[5] Burke v. Brown, 148 Mo. 309, 49 S. W. 1023.

[6] Jewett v. Tomlinson, 137 Ind. 326, 36 N. E. 1106. See, also, State v. Godfrey, 62 Ohio St. 18, 56 N. E. 482.

[7] Bryant v. Kendall, 79 S. W. 186.

[8] Milner v. Shipley, 94 Mo. 106, 7 S. W. 175.

the sale, as such statute is a part of the contract between the state and the purchaser.[9] If the certificate of sale has been issued to a county, an assignee acquires no greater right than that possessed by the county.[1] While a tax title, for all purposes of substantial justice, relates back from the time it becomes absolute to the time when the sale was made, yet it cannot operate to divest rights obtained since the period to which it would relate.[2]

§ 1351. **Statutory regulation.**—If the purchaser secures no title, he has no remedy unless given one by statute. In Indiana, if the tax title proves to be defective on account of an imperfect description, the purchaser has a lien for the sum paid.[3] In Michigan, the purchaser, in some cases where the title proves defective, may receive the amount of his bid back; but this right is construed strictly.[4] The purchaser is allowed a lien in Iowa if the tax deed is canceled on the ground of being made without authority.[5] In Ohio, in certain cases, a purchaser at a tax sale, where the assessment is invalid by reason of a defective description of the land, may bring an action against the owner for the amount of the taxes,

[9] Comstock-Ferre Co. v. Devlin, 99 Minn. 68, 108 N. W. 888.

[1] Felch v. Travis, 92 Fed. 210. See as to purchase from state: Dawson v. Peter, 119 Mich. 74, 77 N. W. 997; Boucher v. Trembley, 140 Mich. 352, 103 N. W. 819; Collins v. Bryan, 124 N. C. 738, 32 S. E. 975; Eldridge v. Richmond, 120 Mich. 586, 79 N. W. 807; Reid v. State, 74 Ind. 252; Textor v. Shipley, 86 Md. 424, 38 Atl. 932; Semer v. Auditor General, 133 Mich. 569, 95 N. W. 732; Huss v. Craig, 124 N. C. 743, 32 S. E. 974; Whitman v. Dickey, 124 N. C. 741, 32 S. E. 974.

[2] Connecticut Mut. Life Ins. Co. v. Butte, 45 Mich. 113, 7 N. W. 707.

[3] Sloan v. Sewell, 81 Ind. 180; Peckham v. Millikan, 99 Ind. 352; Cooper v. Jackson, 71 Ind. 244; Parker v. Goddard, 81 Ind. 294.

[4] People v. Auditor General, 30 Mich. 12.

[5] Orr v. Travacier, 21 Iowa, 68. See Claussen v. Rayburn, 14 Iowa, 136; Early v. Whittingham, 43 Iowa, 168; Brown v. Painter, 44 Iowa, 368; Thompson v. Savage, 47 Iowa, 522. In case of fraud, see Ellis v. Peck, 45 Iowa, 112; Van Shaack v. Robbins, 36 Iowa, 201.

interest, and penalties due at the time of the sale, subsequently accruing interest, and all legal taxes paid by him afterward.[6] In Mississippi, the land is charged in equity, with the amount paid by the purchaser.[7] When a purchaser has the right to have his money refunded in case the sale proves to be void, a statute passed subsequently to the purchase cannot affect his right.[8] In effect, a purchase at a tax sale is a contract between the State and the purchaser, the law in force at the time the sale is made containing its terms.[9] Unless authorized by statute, a purchaser cannot demand the return of the money paid by him when the sale is declared void.[1] And in cases where the statute provides that upon declaring a tax sale void the amount paid to the state at the sale for the tax title shall be refunded, the statute has no application if the purchase is merely a payment of the tax between the purchaser and the owner.[2] If there has not been a compliance with the statute, the original owner is not divested of title,[3] and all the requirements of the statute must be strictly followed.[4] If the taxes have been paid, the purchaser secures no title.[5] A person seeking to show that he has acquired the title of another by statutory proceedings, must prove the performance of every act which the statute requires as a condition precedent

[6] Chapman v. Sollars, 38 Ohio St. 378. But in Johnson v. Stewart, 29 Ohio St. 498, it was held that he could not recover a penalty.

[7] Cogburn v. Hunt, 56 Miss. 718; Meeks v. Whatley, 48 Miss. 337. See, also, Miller v. Hurford, 11 Neb. 377; Petit v. Black, 8 Neb. 52; Reed v. Merriam, 15 Neb. 323.

[8] Fleming v. Roverud, 30 Minn. 273.

[9] State v. Foley, 30 Minn. 350.

[1] Harding v. Auditor General, 136 Mich. 358, 99 N. W. 275; Norris v. Burt County, 56 Neb. 295, 76 N. W. 551.

[2] Easton v. Schofield, 66 Minn. 425, 69 N. W. 326. See, also, Lyon County Commissioners v. Goddard, 22 Kan. 389; Board of Commissioners of Lincoln Co. v. Geis, 23 Kan. 137; Pier v. Oneida County, 102 Wis. 338, 78 N. W. 410.

[3] Rice v. West, 42 S. W. 116.

[4] Webb v. King, 204 U. S. 43, 51 L. ed. 360, 27 S. Ct. 213.

[5] Hake v. Lee, 106 La. 482, 31 So. 54.

to the passing of title,[6] and if there has been no legal authority for the levy of the tax, the deed will transfer no title.[7] Tax sales are made solely by authority of the statute, and the sale will be invalidated by any substantial departure from the terms of the statute giving such authority, by which the owner of the property has been prejudiced.[8] Great strictness is required as the power to sell land for nonpayment of taxes is not derived from the common law, but rests entirely on the statute.[9] The rule is that in all *ex parte* and summary proceedings strict compliance with the law is required.[1]

§ 1352. **Advertisement of sale.**—A tax sale is not valid unless notice is given in the manner required by statute.[2]

[6] Burke v. Burke, 170 Mass. 499, 49 N. E. 753.

[7] Ne-ha-sa-ne Park Assn. v. Lloyd, 55 N. Y. Supp. 108, 25 Misc. Rep. 207.

[8] Jungk v. Snyder, 28 Utah, 1, 78 Pac. 168.

[9] Boon v. Summons, 88 Va. 259, 13 S. E. 439.

[1] Morton v. Reeds, 6 Mo. 64. See, also, Turner v. Hunter, 225 Mo. 71, 123 S. W. 1097; Wallace v. Weld, 124 N. Y. 789; People v. Inman, 197 N. Y. 200, 90 N. E. 438; Welsh v. Briggs, 204 Mass. 540, 90 N. E. 1146; Greeley v. Beckman, 75 N. H. 413, 75 Atl. 528; Berger v. Lutterloh, 69 Ark. 576, 68 S. W. 37; Sheaff v. Husted, 60 Kan. 770, 57 Pac. 796; Reid v. State, 74 Ind. 252; State v. Casteel, 110 Ind. 174, 11 N. E. 219; Flower v. Beasley, 52 La. Ann. 2054, 28 So. 322; Tieman v. Johnston, 114 La. 112, 33 So. 75; White v. Gove, 183 Mass. 333, 67 N. E. 359; Loring v. Groomer, 142 Mo. 1, 43 S. W. 647; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Cordray v. Neuhans, 25 Tex. Civ. App. 247, 61 S. W. 415; Moon v. Salt Lake County, 27 Utah, 435, 76 Pac. 222.

[2] Elliott v. Edins, 24 Ala. 508; Parker v. Rule's Lessee, 9 Cranch, 64, 3 L. ed. 658; Pope v. Headen, 5 Ala. 433; Pitts v. Book, 15 Tex. 453; Williams v. Peyton, 4 Wheat. 77, 4 L. ed. 518; St. Anthony etc. Co. v. Greely, 11 Minn. 321; Early v. Doe, 16 How. 610; State v. Mayor, 36 N. J. L. 288; Minor v. Natchez, 4 Smedes & M. 602, 43 Am. Dec. 488, 10 Smedes & M. 246; Nalle v. Fenwick, 4 Rand. 594; Miles v. Walker, 4 Mich. 641; Bidwell v. Webb, 10 Minn. 59, 88 Am. Dec. 56; Moulton v. Blaisdell, 24 Me. 283; Thompson v. Gotham, 9 Ohio, 170; Styles v. Weir, 26 Miss. 187; Garrett v. Wiggins, 1 Scam. 335; Jenks v. Wright, 61 Pa. St. 410; Fitch v. Pinckard, 4 Scam. 69; Brown v. Veazie, 25 Me. 359; Rafferty's Heirs, 5 Ham. 457; Hughey v. Horrel, 2 Ham. 232; Luffborough v. Parker, 16 Serg. & R.

Where a statute prescribes that the advertisement shall specify "the time and place of sale," and "the name of the person as whose property it was taxed," an advertisement which fails to state that the land was assessed as a person's property, or that he was chargeable with the taxes thereon, will render a tax deed subsequently made void. The tax deed may be vacated.[3] If the statute requires the advertisement to be made once a week for thirty days, an advertisement appearing once in each calendar week, although there may be an intervention of more than seven days between two publications, will be sufficient.[4] Where the requirement of the statute is that publication should be made for three consecutive weeks, it must be for twenty-one days, and if the notice has been published for a less period of time, the tax deed following the sale is void.[5] If the statute provides that the publication shall be once each week for three successive weeks, the last to be at least one week prior to the day of the sale, it will be sufficient if the publication is made on the ninth, sixteenth and twenty-third of the month with the sale on the third of

351; Washington v. Pratt, 8 Wheat. 681, 5 L. ed. 714; Farnum v. Buffum, 4 Cush. 260; Lessee of Wilkin's Heirs v. Huse, 10 Ohio, 139; Kinney v. Beverly, 2 Hen. & M. 318; Allen v. Smith, 1 Leigh, 254; Wistar v. Kammerer, 2 Yeates, 100; Delogny v. Smith, 3 La. 418; Games v. Stiles, 14 Peters, 322; Prindle v. Campbell, 9 Minn. 212; Ronkendorff v. Taylor, 4 Peters, 349, 7 L. ed. 882.

[3] Styles v. Weir, 26 Miss. 187. Mr. Justice Fisher, in delivering the opinion of the court, said: "It has so often been decided that in sales of this kind every essential feature of the law must be observed to uphold the sale, that we deem it unnecessary even to cite the authorities. Under the law, as it then existed, this sale was clearly void. The object of the law in requiring such advertisement was twofold: to notify the absent party that he stood charged with a certain tax, which, if not paid by a certain day, his land would be sold; and to notify the public of the time and place of the sale. Only the last object could be accomplished by this advertisement. It conveyed no notice whatever to Whitehead that he was either a taxpayer on account of the land, or that he was in default in its payment."

[4] Hansen v. Mauberret, 52 La. Ann. 1565, 28 So. 167.

[5] Cadman v. Smith, 15 Okl. 633, 85 Pac. 346.

the next month.[6] The advertisement in the last week of the time required must be published before the date and hour for which the sale is noticed.[7] An advertisement on the day of the sale after the completion of the sale is not sufficient.[8]

§ 1353. **Special instances.**—A tax deed reciting that the officer, prior to the sale of the land, gave four weeks' notice thereof in the manner required by law, is insufficient to pass the title, if it contains no further recital of the time and manner of the notice.[9] Mr. Justice Wagner said of the statement of the officer that he had given notice in the manner prescribed by law: "That is simply a conclusion or opinion by the officer in reference to a fact, which it is the province of a court to judge. A ministerial officer, in making a return or recital as to how he executed a power, must set out the facts and the manner in which he performed the act, and let the court determine whether they comply with or are in accordance with the law. What the collector considered to have been notice as required by law we cannot determine. But it is well settled that it is a judicial act to pass upon the question whether a service or notice has been had in conformity to law, and that the collector was not invested with any such authority. The officer should state the facts as to how he performed his duties, and leave the conclusion of law thereon to the determination of the courts. The recital of notice in the deed simply amounts to nothing, and without giving the required notice the collector had no right or authority to sell." [1] "A regular notice published as the law requires is the very foundation of the collector's authority to

[6] Davis v. Magoun, 109 Iowa, 308, 80 N. W. 423.

[7] Buckingham v. Negrotto, 116 La. 737, 41 So. 54.

[8] In re Lindner, 113 La. 772, 37 So. 720.

[9] Spurlock v. Allen, 49 Mo. 178.

[1] In Spurlock v. Allen, 49 Mo. 178 180. See, also, Nelson v. Pierce, 6 N. H. 194; Wells v. Burbank, 17 N. H. 393; Farnum v. Buffum, 4 Cush. 260; People v. Highway Commrs., 14 Mich. 528; Gilbert v. Turnpike Co., 3 Johns. Ch. 107;

sell. In selling lands for taxes he is executing a mere naked statutory power, and the rights of the citizen to his property cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed that all the prerequisites of the statute have been strictly pursued. This is the settled law of this State." [2]

§ 1354. **Continued.**—Of course, with greater reason, where the statute requires a certain notice to be given prior to the sale, a tax deed which contains no recital that any notice whatever was given is void. No title passes by it.[3] The distinction between a sale by an officer for taxes and a sale by a sheriff under judicial process issued by a competent court, is thus stated by Judge Adams: "The sheriff's proceedings are subject to the supervision of the court, and the court whose process he abuses is the proper tribunal to apply the remedy. The purchaser under a judicial sale looks to the judgment, execution, levy, and sheriff's deed; if they are right, all other questions are between the parties to the judgment and the sheriff. It is eminently proper that the court issuing the process should apply the remedy. Hence, such questions arising under a judicial sale cannot be inquired into collaterally, but can be reached only by a direct proceeding instituted in the proper court for that purpose. A collector's sale is essentially *ex parte*. The officer does not act under the supervision of a court; he acts at his own peril and by his own advice, and must perform every prerequisite required by the statute before the title of the citizen to his property can be passed away from him. the deed of the collector must show affirmatively that the law has been

Briggs v. Whipple, 7 Vt. 18; Cheatham v. Howell, 6 Yerg. 311; Lovejoy v. Lunt, 48 Me. 377; Gwin v. Vanzant, 7 Yerg. 143; Games v. Stiles, 14 Peters, 322, 10 L. ed. 476.

[2] Large v. Fisher, 49 Mo. 307, and cases cited.

[3] Abbott v. Doling, 49 Mo. 302.

complied with in all particulars. And even when a collector's deed shows by its recital that the law has been complied with, it may be contradicted as to material matters by evidence, wherever the questions arise, whether in a collateral proceeding or otherwise. This is the settled law in this State." [4]

[4] In Abbott v. Doling, 49 Mo. 302, 304. In Parker v. Rule's Lessee, 9 Cranch, 64, 69, 3 L. ed. 658, 659, Mr. Chief Justice Marshall, in delivering the opinion of the court, said of a statute of Tennessee: "There is, throughout the act, an obvious anxiety in the legislature to avoid coercive means of collection, unless such means should be necessary, and to give every owner of lands the most full information of the sum for which he was liable, and to afford him the most easy opportunity to pay it. Thus, the accruing of the tax is to be advertised, and the times and places at which the collector will attend to receive it. A personal demand at the dwelling-houses of those who have neglected to attend to this notice must then be made, a reasonable time before the collector can collect the tax by distress. Where lands are owned by nonresidents whose places of residence are known, this personal notice is still required; and where their residence is unknown, certain publications are substituted for and deemed equivalent to personal notice and demand. In each case, it is made the duty of the collector to proceed to collect the tax by distress and sale.

"From this view of the law it is inferred, not only that the legislature was anxious to avoid coercive means of collection, but has also manifested a solicitude to collect the tax by distress and sale of personal property rather than by a sale of the land itself. That all the means of collection prescribed in the act must have been tried, and must have failed before a sale of the land can be made. The duty of the collector to make a personal demand from the resident owner of lands, and to make those publications which the law substitutes for a personal demand where the residence of the owner is unknown, does not depend on the fact that personal property is or is not on the land from which the tax may be levied by distress. It is his duty to proceed in the manner prescribed in the ninth and eleventh sections, in every case. And after having so proceeded, it is his positive duty to levy the tax by distress, if property liable to distress can be found. If, notwithstanding the proceedings directed in the ninth and eleventh sections, the tax shall remain one year unpaid, it is to be raised by a sale of the land. It appears to the court that the thirteenth section presupposes everything enjoined in the ninth and eleventh sections to have been performed, and that the validity of the sale of land owned by a nonresident made by the collector for the nonpayment of taxes must depend not only on his having made the publications required in

If the statute provides that the notice of sale shall be published once in each week for four consecutive weeks prior to the date of the sale, a publication once in each week for four consecutive weeks will be sufficient, although the first publication appeared only twenty-five days before the day fixed for the sale.[5] Where the statute requires a publication once a week for three consecutive weeks preceding the sale, it is necessary that the publication should continue during three full weeks of seven days each. If the publication is made on the seventeenth, and twenty-fourth of September, and again on the first of October, the sale is void and the deed made thereunder passes no title.[6] Where the statute requires the publication to be made once a week for thirty days, a publication of a notice on Tuesday, December seventeenth, Tuesday, December twenty-fourth, Tuesday, December thirty-first, Tuesday, January seventh, and lastly Saturday, January eighteenth, is sufficient, as the statute does not call for the publication on the same day in each week.[7] Under a statute requiring all writs, process, proceedings and decrees to be published in the English language, the notice of a tax sale must be in English and advertised in a newspaper published in the English language.[8] If the newspaper is legally qualified to make the publication, the failure of the manager to file an affidavit setting forth its qualifications as required by statute does not render the publication void.[9]

the thirteenth section, but on his having made those also which are required in the eleventh section. Those publications not having been made in this case, it is the opinion of the majority of this court that the sale is void, and that the judge of the District Court committed no error in giving this instruction to the jury."

[5] Tidd v. Grimes, 66 Kan. 401, 71 Pac. 844.

[6] Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227. "Three consecutive weeks" means twenty-one days: Cadman v. Smith, 15 Okl. 633, 85 Pac. 346.

[7] In re City of New Orleans, 52 La. Ann. 1073, 27 So. 592.

[8] Visscher v. Ottawa Circuit Judge, 116 Mich. 666, 74 N. W. 1013.

[9] Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 106 N. W. 566, 125 Am. St. Rep. 574.

§ 1355. **Statement of amount of tax due.**—"It is of great importance to the rights of property that positive regulations of statute which authorizes its seizure and sale, without the consent of the owner, should be strictly complied with. These regulations are the legal formalities, as essential to the validity of the sale and the transfer of title as are the common and ordinary forms of making and executing deeds between individuals." [1] Where the advertisement and notice of sale contain a statement that the tax is four dollars and twelve cents, when the tax is in fact only three dollars and thirty cents, the sale is void. For all legal purposes, this notice was as invalid as if it had contained no statement of any kind of the amount of the tax. Unless the exact amount is given, the statute is not complied with.[2] "A deviation, however small, is fatal, because a rule of law cannot be made to flucutate according to the degree or extent of its violation." [3] In a case where it was necessary to decide whether the advertisement should contain a particular statement of the amount of taxes due on each lot separately, or where several lots belonged to the same person, the advertisement might not state the aggregate amount of taxes due on all the lots belonging to the same person, Mr. Justice Johnson said: "This may be a very immaterial question, practically, and it may not be very easy to assign a sufficient reason of policy for the one or other alternative. But what have we to do with such inquiries in cases of positive enact-

[1] Alexander v. Pitts, 7 Cush. 503, 505, per Mr. Justice Bigelow.

[2] Alexander v. Pitts, 7 Cush. 503; Smith v. Ryan, 88 Ky. 636; Kimball v. Ballard, 19 Wis. 601, 88 Am. Dec. 705; Burroughs v. Goff, 64 Mich. 464; Pack v. Crawford, 29 Ark. 489; Glidden v. Chase, 35 Me. 90, 56 Am. Dec. 690; Huse v. Merriam, 2 Me. 376; Knox v. Higby, 76 Cal. 264; Treadwell v. Patterson, 51 Cal. 637; Case v. Dean, 16 Mich. 12; Pierce v. Schutt, 20 Wis. 423; Hammontree v. Lott, 40 Mich. 190; Barden v. Columbia County, 33 Wis. 445, 14 Am. Rep. 762; Baker v. Columbia County, 39 Wis. 447; Doland v. Mooney, 79 Cal. 137; Treadwell v. Patterson, 51 Cal. 637; Board of Regents v. Linscott, 30 Kan. 240.

[3] Alexander v. Pitts, 7 Cush. 503.

ment? The law must be pursued, whatever be the previous steps required." The court came to the conclusion that the taxes of each lot ought to be separately exhibited. The advertisement was required to state the "amount of taxes." The court said, that in its ordinary signification, the term would mean an aggregate of taxes, but that the aggregate idea could not be applied to a sum made up from the taxes of many lots, as the adoption of this view would also support a publication showing nothing more than the amount of taxes due upon the whole list of lots advertised, whoever the proprietors might be. "Some more appropriate signification must, therefore, be sought for it; and this is easily found; for when it is considered that the taxes of each lot are made several liens upon each, it follows that this agregate idea can have reference only to the amount made up from the arrears of the two years, which must be due to authorize a sale." "The operation of such a provision must be the test of its own policy. The duty is easily complied with, and the performance of it may not be destitute of practical utility."[4] A tax sale is void if made in excess of one dollar of the amount allowed by law.[5] Where the total amount of the tax

[4] Corporation of Washington v. Pratt, 8 Wheat. 681, 687, 5 L. ed. 714, 716. A sale is invalid if a portion of the taxes for nonpayment of which the land is sold is illegal: McLaughlin v. Thompson, 55 Ill. 249; Drake v. Ogden, 128 Ill. 603; Libby v. Burnham, 15 Mass. 144; Bangs v. Snow, 1 Mass. 181; Hardenburgh v. Kidd, 10 Cal. 402; Wills v. Austin, 53 Cal. 152; Hodgon v. Burleigh, 4 Fed. Rep. 111; Drew v. Davis, 10 Vt. 506, 33 Am. Dec. 213; Barker v. Blake, 36 Me. 433; Elwell v. Shaw, 1 Me. 339; Noble v. Indianapolis, 16 Ind. 506; McQuilkin v. Doe, 8 Blackf. (Ind.) 581; McCann v. Merriam, 11 Neb. 241; Kemper v. McClelland, 19 Ohio, 308; Peterson v. Kittredge, 65 Mass. 33; Brown v. Snell, 6 Fla. 741; Gamble v. Witty, 55 Miss. 26; Shattuck v. Daniel, 52 Miss. 834; Young v. Joslin, 13 R. I. 675; Covell v. Young, 11 Neb. 510; Rougelot v. Quick, 34 La. Ann. 123.

[5] Axtell v. Gerlach, 67 Cal. 483. See Boston Tunnel Co. v. McKenzie, 67 Cal. 485; Bucknall v. Story, 36 Cal. 67; Harper v. Rowe, 53 Cal. 233; Treadwell v. Patterson, 51 Cal. 637; Doland v. Mooney, 79 Cal. 137; Knox v. Higby, 76 Cal. 264.

was $12.03. a sale for sixty cents more than this amount vitiated the sale.[6] No title passes where the sale is for a sum substantially in excess of the tax and the legal charges.[7] So, where part of the taxes have been paid, a sale of the land for the whole amount of the taxes assessed is void.[8] If the sale is made for a trivial sum less than the judgment, the sale is not void.[9] But the sale is void if it is made for more than is legally chargeable.[1] Where in a sale the land was sold for more than was due for taxes and costs in the sale for city taxes, the excess being eight cents, and in the sale for county taxes the excess being $1.60, the sale is void, and the maxim of *de minimis* cannot be applied.[2]

§ 1356. Transposition of amounts due.—Where the statute does not require the advertisement to state the sums of the State and county taxes severally, a transposition in the advertisement of the sums due for State and county purposes is not such an error as will invalidate the sale.[3]

§ 1357. Designation of time and place of sale.—The sale must be made at the time and place required by statute. Where a statute requires the sale to be made at the treasurer's

[6] Baker v. Kaiser, 126 Fed. 317, 61 C. C. A. 303.

[7] McQuesten v. Swope, 12 Kan. 32; Cowling v. Muldrow, 71 Ark. 488, 76 S. W. 424.

[8] Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

[9] London etc. Mortg. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205.

[1] Harvey v. Douglass, 73 Ark. 221, 83 S. W. 946 (excess being $1.-857); Richcreek v. Russell, 34 Ind. App. 217, 72 N. E. 617; Dickinson v. Arkansas Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; Miller v. Williams, 135 Cal. 183, 67 Pac. 788; Genther v. Lewis, 24 Kan. 309; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Chippewa River Land Co. v. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954.

[2] Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

[3] Scott v. Watkins, 22 Ark. 556. See as to advertisement of sale of a proprietary tax, Wentworth v. Allen, 1 Tyler, 226. See, also, where an advertisement under the statute was held sufficient, Rondendorff v. Taylor, 4 Peters, 349, 7 L. ed. 882.

office, and the notice states that the sale will be made at the front door of the courthouse, instead of at the treasurer's office, and the treasurer's office, at the time of the sale, was undergoing some repairs, the treasurer having removed temporarily to another building, a sale made at such temporary office is void.[4] A notice of sale was in this form: "Delinquent Tax List. Treasurer's Office, Linn Co., Kansas, March 5, 1873. Notice is hereby given that the following list of lands and town lots are subject to sale for the taxes of the year 1872, remaining unpaid, and that so much of each tract of land or town lot as may be necessary for the purpose will, on the first Tuesday of May, 1873, and the next succeeding days, be sold by me at public auction for the taxes and charges thereon." The notice, as will be observed, gives the time of sale, but is silent as to the place where the sale is to be made. The court held that, as the notice failed to state the place of sale, a sale had under the notice was void.[5] "We regard the notice of sale." said Mr. Justice Brewer, "as a vital matter in tax-sale proceedings. In that notice time, place, and description are matters of substance, while defects in any of these matters, if not such as to mislead, may be mere irregularities, yet entire omission of either is fatal. A sale for taxes is the exercise of a statutory power, and one conditioned upon certain essential prerequisites. One is, that a proper and sufficient notice of the sale be given. Without such a notice, the power to sell does not exist. The statute names the essential facts in such notice. An entire omission of any one is something more than a mere irregularity." [6] An officer authorized to sell land for delinquent taxes

[4] Richards v. Cole, 31 Kan. 205.

[5] Corbin v. Young, 24 Kan. 198.

[6] In Corbin v. Young, 24 Kan. 198. A sale cannot be sustained which is held at a time other than that prescribed by statute: Haynes v. Heller, 12 Kan. 381; Park v. Tinkham, 9 Kan. 615; Harkreader v. Clayton, 56 Miss. 384, 31 Am. Rep. 369; Vernon v. Nelson, 33 Ark. 748; Conrad v. Darden, 4 Yerg. (Tenn.) 307; Rodd v. Purdy, 10 S. C. 137; Den v. Rose, 4 Dev. (N. C.) 549; Eutrekin v. Cham-

announced that the sale would be adjourned from day to day, and posted a notice containing this announcement. He did not, however, resume the sale, and adjourn it upon the following or any subsequent day, making no further offer to sell the lands, until an agent of the purchaser delivered to him a list of tracts belonging to delinquent owners, proposing to take the land for the taxes due on behalf of each person whose name was placed opposite to each tract on such list. No better offer being made, the officer struck off the entire list. The court declared that this sale did not constitute a public sale as intended by the statute, and, accordingly, the sale was set aside as irregular.[7]

§ 1358. **Subject continued.**—In an action to quiet title, founded on a tax deed, an averment in the answer that the tax sale was held "on the seventeenth day of March, a day not authorized by law therefor," presents a defense, to which a demurrer cannot be sustained. It was insisted that the day specified in the answer might have been a legal day for the sale, because there might have been an adjournment to that day. But the averment that the day specified was not a day authorized by law, precluded, in the opinion of the court, the supposition that the day might have been an authorized day by reason of an adjournment.[8] By statute the day for sale was fixed on the first Monday of July, and by a subsequent statute the day of sale was postponed thirty days. In the year in which a sale was made, the first Monday in July fell on the third day of that month. The sale for taxes was made on the seventh day of August, more than thirty days after the first Monday in July. The sale being made on

bers, 11 Kan. 368; Gomer v. Chaffee, 6 Colo. 314; Allen v. Ozark Land Co., 55 Ark. 549; Caston v. Caston, 60 Miss. 475; McGehee v. Martin, 53 Miss. 519; Mayer v. Peebles, 58 Miss. 628; Mead v. Day, 54 Miss. 58; Chandler v. Keeler, 46 Iowa, 596; Dougherty v. Crawford, 14 S. C. 628; Essington v. Neill, 21 Ill. 139.

[7] Butler v. Delano, 42 Iowa, 350.

[8] Plympton v. Sapp, 55 Iowa, 195.

the wrong day, the court held that a deed showing a sale on such day was void on its face.[9] So, where the officer has no power to sell until after the 20th of April, a sale made on the 17th of April is premature and void. If the deed shows a sale on this prior day, the deed is a nullity.[1]

§ 1359. **Subsequent day.**—Where a sale is not begun on the day named in the notice of sale, the officer has no power to sell at a subsequent time.[2] So where the statute requires that a sale shall be made on the second Monday succeeding the commencement of the term of the court at which judgment against the land is rendered, the sale, if not made on that day, is void.[3] An advertisement stated that

[9] McGehee v. Martin, 53 Miss. 519; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369.

[1] Gomer v. Chaffee, 6 Colo. 314. Mr. Chief Justice Elbert, in delivering the opinion of the court, said: "The power of an officer making a tax sale is purely statutory. A statutory power must be exercised according to statutory directions. In no class of cases has this rule been more strongly insisted upon than in case of tax sales. A substantial, and in many cases a strict, compliance with the provisions of the law preparatory to and authorizing the sale, is a condition of the power and essential to its rightful exercise. Doubtless, certain provisions of the revenue law are merely directory, but when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, such as, if disregarded, would injuriously affect his rights, they are to be treated as mandatory. They must be followed, or the acts done will be invalid. To the class of mandatory provisions belong requirements respecting notice and time and place of sale. Every notice which the statute provides for the benefit and protection of the taxpayer must be given with scrupulous observance of all its requisites. It cannot be shortened a single day, and if required to be given within a certain time, or in any prescribed mode, it must be so given. The sale must be made at the very time and place provided by law for that purpose. The officer has no power to sell at any other time or place."

[2] Prindle v. Campbell, 9 Minn. 212. See, also, Sheehy v. Hinds, 27 Minn. 259; Entrekin v. Chambers, 11 Kan. 368; Park v. Tinkham, 9 Kan. 615.

[3] Hope v. Sawyer, 14 Ill. 254. See, also, as to notice of time and place of tax sales, Dougherty v. Crawford, 14 S. C. 628; McDermott v. Scully, 27 Ark. 226; Spain

notice was given that certain pieces of land would "be exposed to sale on Thursday, the twenty-second day of May next, at the courthouse in Warren, to defray the tax" of a certain year. It was signed by the officer, with the addition to his name of his office, "collector." It was contended that the advertisement was invalid because the collector did not add "Trumbull County" to his signature as collector, and to Warren, also, as the place of sale. The court held that the advertisement was sufficient without the addition contended for.[4]

§ 1360. **Omission to state year.**—An advertisement stated the time of sale to be "the fourth day of April next,"

v. Johnson, 31 Ark. 314; Bonnell v. Roane, 20 Ark. 114; Hogins v. Brashears, 13 Ark. 242; Merrick v. Hutt, 15 Ark. 331; Vernon v. Nelson, 33 Ark. 748; Kelso v. Boston, 120 Mass. 297; Wilkins v. Huse, 10 Ohio, 139.

[4] Sheldon v. Coates, 10 Ohio, 278. "At the date of this advertisement," said Mr. Justice Wood, in delivering the opinion of the court, "there was no township of the name of either Youngstown or Warren, except those in Trumbull County, in the State of Ohio. An advertisement in an Ohio newspaper, dated Youngstown, in 1806, would sufficiently indicate Youngstown, in Trumbull County, and if written and posted up at the door of the courthouse, or anywhere within the bounds of Trumbull County, as the law required, it would certainly, to a common intent, at least, indicate the same thing. But when in addition, the names of the owners, the lot, township, range, etc., are all specified, the owner in casting his eye upon such an advertisement could not well mistake the identity of his property, if advertised, nor a person desirous of purchasing, its location, unless both were determined not to know its contents and to sleep upon their rights. In this advertisement, these designations are all set forth, though at most it is doubtful whether the law, at that time, required anything more to be stated in the advertisement, than that such lands as were delinquent for taxes, in the collection district, would be sold at such a time and place. But if the advertisement was not then sufficiently certain, they should be gross defects only which should be noticed, if at all, after the lapse of *thirty-four* years, and a majority of the court are of the opinion that the advertisement was sufficient." The court lay stress on the fact that the long lapse of time should prevent minor defects being noticed, but the majority of the court held the advertisement sufficiently definite.

without giving the year. The advertisement, however, was posted up January 31, 1874, and remained posted until the day of sale, and it was published three weeks successively in the newspapers in the month of February, 1874. The court decided that the notice was sufficiently definite, although the year was not stated, as no one could be misled by the notice as to the time of the sale.[5]

§ 1361. **Posting in public places.**—If the statute requires that the advertisement shall be posted in a "public place," it is unnecessary to post the advertisement in an unincorporated place which is uninhabited.[6] In Michigan, the statute provided that "the auditor general shall annex to, and cause to be published with each of said statements, a notice that so much of each tract or parcel of land described in said statements as will be necessary for the purpose, will be sold by the county treasurer on the first Monday in October next thereafter, at such public and convenient place at the seat of justice of the county as the county treasurer may select, for the payment of the taxes, interest, and charges

[5] Taft v. Barrett, 58 N. H. 447. It has been held that although a notice states correctly the amount of the tax, yet, if it states erroneously the year for which the tax was assessed, the defect is fatal: Knowlton v. Moore, 136 Mass. 32.

[6] Wells v. Burbank, 17 N. H. 393. Said the court (p. 411): "It is not necessary to settle at this time what may be a public place within the meaning of the statute. Practically, it is generally supposed to mean a tavern, store, or other place where people are in the habit of resorting for the transaction of business. Perhaps a meeting-house, open from week to week for public worship, may come within the description. How we might hold in this case if there had been a dwelling-house within the township, but no place more public, we have no occasion to inquire. As there was no inhabitant, there could be no public place. *Lex non cogit ad impossibilia.* The result is not that the tax could not be collected because no advertisement could be posted in a public place in the township, but that it might be collected without such advertisement, if the other notices required by the statute were duly given." And see, also, Wells v. Company, 47 N. H. 255; Cahoon v. Coe, 52 N. H. 525.

thereon." The court decided that a notice which stated that the sale would be made at such public and convenient place as the county treasurer should select at the county seat, was a sufficient compliance with the statute.[7] Mr. Justice Christiancy said that the question was purely one of statutory construction. "The power of the legislature to authorize a sale of these lands for taxes, without any such notice of the place, is admitted. We are not, then, to inquire what we think the legislature *should* have required in reference to the notice of sale, but what they have *actually seen fit to require*. The court are not to make or amend the statute, but to construe it as it is; and the whole office of construction is to ascertain and give effect to the intention of the legislature. And in construing statutes in reference to tax sales, the rules of construction should be no more strict or technical, or more loose and fanciful, than in the construction of statutes generally. In all alike, the legislative intent must govern." [8] It is the province of the legislature to declare

[7] Clark v. Mowyer, 5 Mich. 462. This case was affirmed in Wisner v. Davenport, 5 Mich. 501.

[8] In Clark v. Mowyer, 5 Mich. 462, 465. The proposition urged in this case was, that the county treasurer should select the particular place of sale at the county seat, and notify the auditor general of the selection before notice of sale was given, and that the place so selected should be inserted in the notice issued by the auditor general. The court said: "The *first* and obvious answer to this proposition is, that if the legislature had intended the notice to state the particular house or place selected by the treasurer, it would have been easy, and in the natural course of legislation upon a matter where certainty in the law was so important, and where any uncertainty might materially affect the revenue of the State, to have said so expressly. It was a matter which could not well have escaped their notice. They had expressly given the treasurer the right to select, and if we believe it did escape their notice, then it clearly cuts off all inference of the intent claimed, and it would then be a *casus omissus*, and not within the statute. But, *second*, if it were intended that the several county treasurers should so inform the auditor general of the place selected before he issued his notice, it would have imposed it as a duty upon the county treasurers to make such selection before that time, and officially to notify the auditor general of the fact, and have given him, also, a right to de-

what shall be done, what notice shall be given and for what time, and when the legislature has prescribed a mode, the courts cannot allow a departure from it. The posting of a

mand its performance. But the law, so far from imposing this upon the treasurers as an official duty, has not even authorized them to do so officially; and hence any notification by such treasurer of such selection would be an unofficial act, and of no binding authority. Suppose the treasurer was called upon to select and notify the auditor, and should refuse, could this court compel him to do so by *mandamus* under this law? Clearly, it could not. It is little less than absurd to suppose that the legislature intended to leave the revenue of the State thus dependent upon the mere chance of the auditor being able to divine beforehand the various places selected, or to be selected by the several county treasurers in the State, without requiring them to give the information. It is not very reasonable to suppose the legislature intended to make the public revenue dependent upon the unofficial politeness of thirty or forty different county treasurers, acting upon their separate and individual responsibility, without any of the obligations of official duty. But, *third*, this proposition is not sustained by the language of the statute. If it had been the intention that the treasurer should first select and notify the auditor of the place selected, and that he should state the place so selected, it would more properly have used the terms 'at such place as the county treasurer *may have selected*,' and not 'at such place as the treasurer may select.' The entire clause looks to the future, and not to the past. But, *fourth*, suppose the statute were ambiguous or doubtful as to this point; suppose, even, it were barely susceptible of a construction not requiring the auditor to state the place; and (what I think is contrary to the fact) that the more obvious construction were such as the plaintiff claims, still from the very date of the act it has received a different practical construction in the auditor general's office, which, in this respect, has been uniform from that day to this. Every sale for taxes made in the State for the last twelve years has been made under this practical construction, and under an auditor's notice, precisely the same as that given in this case, not one in which the place selected by the treasurer has been stated. This practical construction must have been known to the legislature. We cannot suppose them ignorant of what all other men knew in reference to the public acts of one of the executive departments of the government, upon which, more than any other, depended the revenue of the State. Yet, with full knowledge of this practical construction, the legislature, in 1853, when they entirely remodeled the tax laws of the State, continued this provision without the alteration of a letter. A like general revision of the tax laws is again made in 1858, and this provision is retained

notice of sale on the inside door of the treasurer's office is sufficient under a statute requiring that the notice shall be posted in some conspicuous place in the treasurer's office.[9] An officer may post the notices of sale by a deputy.[1] Under a statute requiring that the notice shall be posted on the courthouse door, it may be posted on a bulletin board at the door.[2] Where the statute requires the notice to be posted up "in the four most public places in the city at least three weeks before the sale," it is sufficient to show that the officer posted the notices three weeks before the sale, and it is not necessary to show that they remained posted during that period.[3]

§ 1362. **Particular place of sale.**—If the statute requires the sale to be made before the courthouse door of

without alteration. Rights have become vested under this construction to the amount of many hundred thousands, and perhaps even millions of dollars; and it is now too late to disturb this construction (unless it be clearly against any possible construction of the statute) without wantonly disregarding the principles of justice and sound policy, for centuries well settled by judicial decisions. That such legislative sanction should have weight in the construction of the statute, see Coutant v. People, 11 Wend. 511; Rex v. Loxdale, 1 Burr. 447; Henry v. Tilson, 17 Vt. 479; McKenzie v. State, 6 Eng. 594; United States v. Freeman, 3 How. 557, 11 L. ed. 724. That the practical construction so long given by the auditors general in their notices of sale under this section should control in this case, see 2 Coke R. 81; Co. Lit. 186n.; Earl of Buckinghamshire v. Drury, 2 Eden, 61, 64, 74; United States Bank v. Halstead, 10 Wheat. 51, 63, 6 L. ed. 264, 267; Bank of Utica v. Mersereau, 3 Barb. Ch. 530, 579 49 Am. Dec. 189. Practical construction by departments at Washington: Surgett v. Lapice 8 How. 68, 12 L. ed. 990; Bissell v. Penrose, 8 How. 336, 12 L. ed. 1103. Practical construction of constitution: Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Briscoe v. Bank of Kentucky, 11 Peters, 319, 9 L. ed. 733; United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259. As to form of acknowledgment of deeds: McFerran v. Powers, 1 Serg. & R. 102; 5 Cranch, 22, 3 L. ed. 25. See, also, Jackson v. Jumaer, 2 Cowen, 552."

[9] Allen v. Allen, 114 Wis. 615, 91 N. W. 218.

[1] Long v. Donnell, 104 Mo. 519, 15 S. W. 931.

[2] Hoskins v. Iowa Land Co., 121 Iowa, 299, 96 N. W. 977.

[3] Long v. Donnell, 104 Mo. 519, 15 S. W. 931.

the county, the sale, if made inside the courthouse, is void, and the sale and subsequent deed pass no title.[4] "It is well established in this State, that a person claiming to hold land under a sale for taxes can only maintain his title when the law has been strictly pursued. It is immaterial whether it was more convenient to all persons, or better in any respect, to sell within than before the courthouse; the law has prescribed the place of sale, and that is the only proper place; and it is so because the law has said so, and there can be no reasoning about it."[5] Under a statute requiring an advertisement to be posted up in some public place, it is held that a shoemaker's shop is not a public place.[6] Where an affidavit stated that one notice was posted "on the inner walls of the Peshtigo Co's store at Peshtigo village," one "on the inner walls of the postoffice in Marinette," and one "on the inner walls of the postoffice in the city of Oconto," but omitted to state that the places specified were public places, the court decided that in the absence of proof to the contrary, it will be presumed that places of the kind named in the affidavit are public places.[7]

§ 1363. **Publication of notice in newspaper.**—If a statute requires a notice to be published for five days, "Sundays and nonjudicial days excepted," and if the last day of publication falls on a Sunday, and the notice is published in the paper issued on that day, the statute has not been complied with. The last day being Sunday it is not to be counted.[8] If the statute requires the publication to be in the newspaper

[4] Rubey v. Huntsman, 32 Mo. 501, 82 Am. Dec. 143.

[5] Rubey v. Huntsman, 32 Mo. 501, 82 Am. Dec. 143. See, also, Vasser v. George, 47 Miss. 713; McNair v. Jenson, 33 Mo. 312; State v. Rollins, 29 Mo. 267.

[6] Tidd v. Smith, 3 N. H. 178.

[7] Hart v. Smith, 44 Wis. 213. A sale must be made at the place designated by statute, or it will not be upheld: Park v. Tinkham, 9 Kan. 615; Richards v. Cole, 31 Kan. 205.

[8] San Francisco v. McCain, 50 Cal. 210; People v. McCain, 51 Cal. 360.

of the public printer of the State, and before the expiration of the time for publication such paper had ceased to be the State paper, the notice is not sufficient.[9] One of the provisions in the Constitution of the State of Illinois was: "Hereafter no purchaser of any land or town lot, at any sale of land or town lots for taxes due either to this State, or any county, or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this State, shall be entitled to a deed for the land or town lots so purchased, until he or she shall have complied with the following conditions, to wit: Such purchaser shall serve, or cause to be served, a written notice of such purchase on every person in possession of such land or town lot, three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or town lot, the description of the land or town lot he has purchased, and when the time of redemption will expire. In like manner he shall serve on the person or persons in whose name or names such land or lot is taxed, a similar written notice, if such person or persons shall reside in the county where such land or lot shall be situated; and in the event that the person or persons in whose name or names the land or lot is taxed do not reside in the county, such purchaser shall publish such notice in some newspaper printed in such county; and if no newspaper is printed in the county, then in the nearest newspaper that is published in this State to the county in which such land or lot is situated; which notice shall be inserted three times, the last time not less than three months before the time of redemption shall expire. Every such purchaser, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of this section, stating particularly the facts relied on as such compliance; which affidavit shall be delivered to the person authorized by law

[9] Bussey v. Leavitt, 12 Me. 378.

to execute such tax deed, and which shall by him be filed with the officer having custody of the records of lands and lots sold for taxes, and entries of redemption in the county where such land or lot shall lie, to be by such officer entered on the records of his office, and carefully preserved among the files of his office; and which record or affidavit shall be *prima facie* evidence that such notice has been given." These constitutional provisions came before the supreme court of that State for construction, and Mr. Chief Justice Treat, in delivering the opinion of the court, said that they were manifestly designed for the benefit of the real estate owner. "The principle is, that he shall not be divested of his title by a sale for taxes, unless he has, when practicable, personal notice of the sale, and of the time when his right to redeem will expire. To secure this object, the purchaser is required to serve a written notice of those facts on every person in possession of the land, and on the party in whose name it was listed for taxation, at least three months before the time of redemption will expire. If the latter is not a resident of the county, a similar notice must be published in a newspaper of the county; and if there is no newspaper within the county, the notice must be published in the nearest newspaper to the county. These requirements, being intended for the protection of the owner, must be strictly complied with in order to divest him of title. They are imperative and cannot be disregarded. The purchaser is not entitled to a deed until these precedent conditions are strictly performed; and if he succeeds in obtaining a deed without such performance, the title of the owner will not thereby be defeated. In this case, the plaintiff, in whose name the land was assessed, did not reside in the county, and no newspaper was published therein. It was, therefore, incumbent on the defendant to give notice in the 'nearest newspaper published in this State to the county.' The question is, has he complied with this requisition? It is clear that the answer

must be in the negative. The notice is to be published in the nearest newspaper to the county. That is a matter of fact which is easily ascertained. A newspaper of an adjoining county may not be the nearest newspaper to the county in which the land is situated. And the newspaper of the adjoining counties may not be equally near to the county where the land lies. The question which is the nearest newspaper to the county must necessarily be determined by comparing the distances between the places of publication and the county line. That is the only way of ascertaining the paper in which to give the notice. In this case, there were four newspapers published nearer to the county than the one in which the notice was inserted. The notice should have appeared in the Alton paper, its office of publication being several miles nearer to the county than that of the Carrollton papers. The fact that the latter paper had a respectable circulation in the county has nothing to do with the question. The owner has the right to insist upon a strict execution of this requirement of the constitution. He is not to be deprived of his estate, except in the mode prescribed. The affidavit of the defendant was only *prima facie* evidence that the notice was published in the nearest newspaper. It was competent for the plaintiff to prove that the fact was otherwise, and when that was done, the sheriff's deed necessarily fell for the want of a foundation upon which to stand."[1]

§ 1364. **Variance in name of paper.**—A statute required an advertisement to be published in the Vermont Republican, printed at a certain place. The record showed that the advertisement was published in the Vermont Republican and American Yeoman, printed at the same place. The court held that the latter sufficiently appeared to be the same paper designated in the statute.[2]

[1] Weer v. Hahn, 15 Ill. 298, 301. Redfield, J., in delivering the opinion of the court, said: "Had the

[2] Isaacs v. Shattuck, 12 Vt. 668.

§ 1365. **Paper partly printed in county.**—Where the publisher of a newspaper has the half of each issue printed out of the county, and the other half, including the notice of sales for delinquent taxes, together with other matters of local interest, is printed in the county, the paper is considered to be printed in the county, as contemplated by the statute.[3]

§ 1366. **Publication in several newspapers.**—A statute in Ohio provided that the officer on receiving the delinquent list should immediately cause the same to be advertised for six weeks successively in some newspaper printed at the seat of government of the State, and also in a newspaper printed in his proper county, if any such there was, and if not, in some newspaper in most general circulation in such county. It was contended before the supreme court, that as there was no paper printed in the county in which the land sold for taxes was situated, and as the paper published at the capital of the State was in general circulation in that county, it was not necessary to publish it in any other. But the court said that such a construction could not be placed upon the law. The statute required the publication, according to the views of the court, to be made in two papers.[4] The court in concluding its opinion made this observation: "The requisitions of the law are substantial and useful, and can-

name of the paper been entirely changed, it might be necessary that it should in some way appear to be the same paper in which the statute required the publication. But the assumption of some kind of surname, or *nom de guerre,* not as Scipio received the surname of Africanus, in consequence of what he *had* done, but as a mere catch or indication of the principles which they *intend* to adopt and advocate, is of so common occurrence among newspaper publishers as to attract no more attention from the public than does the change of the 'text' or motto, or of the type in which the name of the paper is printed. The second name of a newspaper is seldom, if ever, regarded in common parlance, and need not have been in the record. But the 'addition' raises no doubt of the identity of the paper."

[3] Hart v. Smith, 44 Wis. 213.

[4] Lessee of Hughey v. Horrel, 2 Ohio, 231.

not be dispensed with. Tax sales are attended with greater sacrifices to the owners than any others. Purchasers at those sales seem to have but little conscience. They calculate on obtaining acres for cents, and it stands them in hand to see that the proceedings have been strictly regular."[5] If the law requires that the officer shall, at least a specified time before the expiration of the period allowed for redemption, cause to be published for a certain time in all the public newspapers printed in the State a notice that unless the lands should be redeemed by a certain day they would be conveyed to the purchaser a failure to publish a notice in compliance with the statute, in one or more of such newspapers, renders void the conveyance made by the officer to the purchaser.[6]

§ 1367. Time of publication.—Where a statute requires a notice of intention to make street improvements to be published daily, with the exception of Sundays, for ten days in the newspaper having the contract for the public printing, the notice, if printed in such paper for eight out of ten consecutive days, the two remaining days being Sundays, the paper not being issued on such days, is not published for the requisite time. In such a case the publication is insufficient and void.[7] Where the statute requires the notice to be published for twenty days, a publication for nineteen days is insufficient. "If the treasurer could reduce the time to nineteen days, there is no reason why he might not have made it ten, or any less number."[8] If a statute requires a notice to be published daily, Sundays excepted, in a newspaper for five days, a publication commencing on the fourth day of the month and ending on Sunday, the eighth day of the month, is insufficient, as the last publication should

[5] In Lessee of Hughey v. Horrel, 2 Ohio, 231, 233.

[6] Bunner v. Eastman, 50 Barb. 639.

[7] Haskell v. Bartlett, 34 Cal. 281.

[8] State v. Mayor of Newark, 36 N. J. L. 288.

have appeared on the ninth.[9] Under a statute requiring that a notice of the time and place of the sale of real property for taxes shall "be given by advertisement inserted in some newspaper published in said city, once in each week for at least twelve weeks," the notice must be published for twelve full weeks, or eighty-four days. If the notice is published for only eighty-two days, the sale is illegal and no title passes.[1] In this case the question was whether the statute meant that twelve insertions in successive weeks was sufficient notice, without respect to the number of days in twelve weeks. The language of the court on this point was: "We do not doubt that if the statute had been 'once in each week for twelve successive weeks,' a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator has used the words, 'for at least twelve successive weeks,' we cannot doubt that the words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks or eighty-four days. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. Our construction of the statute under review gives to every word its meaning. The other leaves out of consideration the words 'for at least,' which mean a space of time comprehended within twelve successive weeks or eighty-four days. The preposition 'for' means, of itself, duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a

[9] Alameda Macadamizing Co. v. Huff, 57 Cal. 331.

[1] Early v. Doe, 16 How. 610, 14 L. ed. 1079.

designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before. The notice for sale in this instance was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words 'once a week' which precede in this statute those which follow them, 'for at least twelve successive weeks.'. . . . The construction of the statute will be recognized to be in harmony with that policy of the law which experience has established to protect the ownerships of property from divestiture by statutory sales, where there has not been a substantial compliance with the law, by which a public officer is empowered to sell it. Property is liable to be sold on account of an undischarged obligation of the owner of it to the public or to his creditors. But it can only be done in either case where there has been a substantial compliance with the prerequisites of the sale, as those are fixed by law. Any assumption by the officer appointed to make the sale, or disregard of them, the law discountenances. He may not do anything of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale within which the owner of the property may prevent a sale of it, by paying the demand against him, and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do, until a sale has been made. He may arrest the uplifted hammer of the auctioneer when the cry for sale is made, if it be done before a *bona fide* bid has been made."[2] So, a requirement of publication for "three successive weeks in some

[2] In Early v. Doe, 16 How. 610, 616, 14 L. ed. 1079, 1081, per Mr. Justice Wayne.

newspaper," means a publication for twenty-one days, and not simply three insertions in a newspaper.[3]

§ 1368. **Parol evidence to correct mistake.**—Where the record shows upon its face an insufficient advertisement, parol evidence is not admissible to correct the mistake.[4]

§ 1369. **Date of paper.**—The date of a paper is generally to be considered as the date of its publication.[5] Thus, a statute required the first publication of a notice of a tax sale in a newspaper to be eight weeks prior to the day of sale. The first publication was in the number dated September 21st, giving notice of a sale for November 15th. There being one day wanting to make eight weeks, a party to a suit sought to introduce evidence to show that the paper was actually printed and ready to be delivered on the afternoon of September 20th, and was actually delivered to the subscribers in the village where the paper was published that afternoon or evening, and the residue was left in the post-office that night directed to the other subscribers, and went out in the mail the next morning. But the court held that the publication of notice was insufficient, and the sale void, saying: "We think the true construction of the statute is that the printed date of the newspaper is generally to be

[3] Loughbridge v. The City of Huntington, 56 Ind. 253. See, also, as to time of publication, Caston v. Caston, 60 Miss. 475; Pennell v. Monroe, 30 Ark. 661; Clarke v. Rowan, 53 Ala. 400; Moore v. Brown, 4 McLean, 211; 11 How. 414, 13 L. ed. 751; Steuart v. Meyer, 54 Md. 454; Kellogg v. McLaughlin, 8 Ohio, 114; Dubuque v. Wooton, 28 Iowa, 571; Westbrook v. Willey, 47 N. Y. 457; Renshaw v. Imboden, 31 La. Ann. 661; Hilgers v. Quinney, 51 Wis. 62; Eaton v. Lyman, 33 Wis. 34; Cass v. Bellows, 31 N. H. 501, 64 Am. Dec. 347; Andrews v. People, 83 Ill. 529, 84 Ill. 28; Ricketts v. Hyde Park, 85 Ill. 110; Hobbs v. Clements, 32 Me. 67; Elliott v. Eddins, 24 Ala. 508; Flint v. Sawyer, 30 Me. 226; Farrar v. Eastman, 1 Fairf. 191; 5 Greenl. 345.

[4] Kellogg v. McLaughlin, 8 Ohio, 114; Fitch v. Pinkard, 4 Scam. 69; Alvord v. Collin, 20 Pick. 418.

[5] Schoff v. Gould, 52 N. H. 512.

regarded as the date of publication, and that there was no evidence in this case competent to show that the paper was published the day before its date. However it might be in case of fraud or mistake in the printed date, or under other peculiar circumstances, we have no doubt but that the date of the paper was intended by the legislature to be the date of publication in ordinary cases of notice in a weekly paper published on a fixed and uniform day of the week, purporting, and generally understood to be published on the day of its date, and actually issued so near that day as to justify the understanding that for the practical purpose of giving legal notice, that is the day of publication. Obvious reasons of convenience and certainty, and the general understanding and practice prevailing in this State, which the makers of the statute cannot be presumed to have overlooked, show that such must have been the legislative design." [6]

§ 1370. Publication in supplement.—If a statute provides that the delinquent tax list shall be published in a newspaper published in the city and county in which the taxes are levied, or in a supplement to such newspaper, and that the time and place of commencing the sale shall be specified in such publication, the list, if published in a supplement, must be published in one, the circulation of which is coextensive with that of the paper. If the supplement is not circulated coextensively with the newspaper, but is delivered to subscribers and others within the city and county, and not to those who reside outside of the limits of the city and county, the publication is not in compliance with the statute, and a tax deed founded on such sale is void.[7] A decision to the same effect was made in Kentucky, where the printer printed the list on separate sheets accompanying the paper, in the first six publications in the proportion of two-thirds to the whole number of subscribers, and in the

[6] Schoff v. Gould, 52 N. H. 512. [7] Tully v. Bauer, 52 Cal. 487.

remaining publications in the proportion of about one-half. To comply with the law, the sheets should have been as numerous as the subscribers of the paper.[8] If, however, the circulation of the supplement is as extensive as that of the paper itself, no objection can be taken to the publication of the list in this form.[9]

§ 1371. Printed notices.—If the statute requires a printed notice, a written one will not suffice.[1] The statute in force in Missouri provided that if ordered by the court, notice should be given 'by posting no less than one printed handbill or advertisement in each municipal township in the county where the lands are situate." The only recital of any advertisement in the deed was that the collector proceeded by posting in the most public place in each municipal township one *written* notice, containing a list of the land, etc., The question presented to the court for decision was whether the putting up of written notices was a sufficient compliance with the law. Mr. Justice Wagner, in delivering the opinion of the court, said: "The proposition may be laid down as undoubted that the advertisement in the time and manner prescribed by law is prerequisite to the validity of a tax title; and this principle is not altered by the provision in our law requiring judgment to be entered up in the county court. Before the adoption of the present law, the officer derived his power to sell, in part, from the advertisement. Now, the court obtains its authority to proceed, in part, from the same source. Power is conferred upon the court to be exercised on certain defined and limited contingencies; and these contingencies must have happened, and the conditions on which it can act must have been performed, before

[8] Davis v. Simms, 4 Bibb, 465.
[9] Zahradnicek v. Selby, 15 Neb. 579; Wilkin v. Keith, 121 Mich. 66, 79 N. W. 887.
[1] Lagroue v. Rains, 48 Mo. 536.

its act can be valid. Its authority does not attach until the law has been pursued and complied with. The notice is the indispensable prerequisite, and, without it, the court has no jurisdiction in the premises. As the proceeding is *ex parte*, and founded upon constructive notice, a strict compliance with the law by which the court acquires jurisdiction is necessary. When the law prescribes a particular or specific manner for making advertisements or giving notices, no court or officer has a right to substitute another or a different mode. The law required that the handbill set up should be printed. Here the requirement was wholly disregarded, and written handbills were substituted. There are, doubtless, good and sufficient reasons why the notices should be printed. Some persons can read printing who cannot read writing. Printed notices are calculated to attract attention, impart a more general information, and give greater facility for examining into what land is to be sold or has become delinquent. Everything that has a tendency to inform the community, and promote competition in these sales, is essential. But, without giving reasons, it is sufficient for us to know that the law absolutely demanded that the handbills posted up should be printed, and that the officers disregarded and disobeyed its express mandates. If they could make one kind of substitution, they could another, and no person could ever know how or where to look for the protection of his rights." [2]

§ 1372. **Consent to irregularities.**—The authority of the officer to sell must be derived from a compliance with the provisions of the statute. On this ground it has been decided that a sale founded on an irregular advertisement is not valid, although the delinquent gave a verbal consent to the irregularity in the advertisement.[3] A person is not estopped from objecting to the validity of a tax because he

[2] In Lagroue v. Rains, 48 Mo. 536, 538.

[3] Scales v. Alvis, 12 Ala. 617, 46 Am. Dec. 269.

paid, in previous years, taxes levied upon assessments made in the same manner.[4] "One might almost as well defend an action for an assault and battery by pleading that he had beaten the plaintiff every year for many years, and that this was the first time the plaintiff had ever complained." [5]

§ 1373. **Waiver of defects.**—But if an assessment is valid, and a person interested in the estate requests a reassessment, apportioning the taxes according to the respective interests of the parties, he cannot subsequently object to the new assessment on the ground merely that the assessors had no authority to make it.[6] If a party to whom land has been assessed tenders a sum of money for the purpose of redeeming land from a tax sale, he admits, it is held, that the amount tendered is due, and waives thereby any irregularity in the assessment or sale.[7] In a case in Michigan, there was a misdescription of lands in an assessment-roll, caused by following a list furnished by the parties themselves. The court refused to allow them to claim the misdescriptions as a ground for equitable relief, but remitted them to their legal remedies.[8]

§ 1374. **Estoppel.**—It is held that by participating in the procurement of the passage of a local statute, by ratifying, acquiescing in, or approving it after its passage, and by receiving benefits under it, parties are estopped from denying the constitutionality of such statute. Such persons, it is held, are liable to the tax authorized by the statute, although to all other persons it may be unconstitutional and invalid.[9] The fact that a tax deed shows a sale of several

[4] Cruger v. Dougherty, 43 N. Y. 107.

[5] Cruger v. Dougherty, 43 N. Y. 107, 120.

[6] Burr v. Wilcox, 13 Allen, 269.

[7] Burton v. Hintrager, 18 Iowa, 348. See Brayton v. The County of Delaware, 16 Iowa, 44.

[8] Hubbard v. Winsor, 15 Mich. 146.

[9] Ferguson v. Landram, 5 Bush, 236, 96 Am. Dec. 350. In this case,

parcels of real estate *en masse,* and that the certificate of sale upon which such deed was executed by the officer showed a sale in parcels, does not estop the officer from denying the validity of such deed.[1]

§ 1375. **Description of land in notice of sale.**—The description of the property in the notice of sale and prior proceedings must be sufficient to enable it to be identified, and must follow the requirements of the statute. It may be well to note some instances. A description, "house and lot north side of Commercial street, formerly owned by Belle Creole, also brick store north side of Commercial street and second from the corner of Pine and Commercial, including lot and all the appurtenances,"—notwithstanding, that at the top of the page containing this description appear the words: "Nevada County, Nevada Township, Nevada City,"—is fatally defective, because it does not give the "metes and bounds, or describe the premises by lots or fractions of lots," as required by the statute in force at that time.[2] If land is described as the "unsold portion" of eleven square leagues of land known by a certain name, the description is fatally defective.[3] "The assessment must contain a true description of the land in order that the purchaser may be enabled to know what land he is purchasing, and that the owner may know from the advertisements required to precede the sale, that his land is exposed to sale, and that he may save it by

to avoid a draft, the people of a county met at the county seat, and resolved to raise a sum of money as a military fund, to be distributed among those who should thereafter volunteer, in addition to the bounty offered by the federal government. They appointed a committee to borrow the money, and to secure an act of legislature authorizing the issue of bonds, and the levy of a tax. See, also, Ferguson v. Landram, 1 Bush, 548.

[1] Byam v. Cook, 21 Iowa, 392. See Telle v. Green, 28 Ind. 184; Ives v. North Canaan, 33 Conn. 402. See, also, Buchanan v. Upshaw, 1 How. 56, 11 L. ed. 46; Isaacs v. Gearheart, 12 Mon. B. 231.

[2] Kelsev v. Abbott, 13 Cal. 609.

[3] People v. Pico, 20 Cal. 595.

paying the tax."[4] A notice is not valid where the description omits the name of the county and state.[5] Where the statute requires the land to be described with reasonable certainty and the correct description of the land should be "Lot 1 in the Columbus Wheel Co. & M. T. Reeves' Addition to the City of Columbus," a description of it as "Lot 1 Col. W. Co." is insufficient.[6] If the notice gives the subdivision and a reference to the plat and the county, records where it may be found, a notice describing the land as 944 acres as per plat instead of 9.43 acres, is not fatally defective.[7] If the advertisement of the sale is invalid, the sale is invalid.[8]

§ 1376. **Illustrations.**—An assessment describing a tract by metes and bounds, and excepting from the tract parcels of this tract which had previously been conveyed, without describing the excepted portions by metes and bounds, nor in any manner whatever, except by referring to deeds placed on record, is void.[9] "The law, in requiring an advertisement of the sale, has the double object in view—to apprise the owner that the tax is unpaid, and to invite the attention of purchasers in such manner that the land may be sold for its fair market price. To attain these objects, it is necessary that the description should be such that the owner may know that the tax on his land is unpaid, and purchasers may know or learn the precise tract intended, and be enabled to estimate its actual value.[1] A description of land as a "part of a lot," or "one acre of a lot," without further words of quantity or location, is too vague and uncertain to authorize

[4] Yenda v. Wheeler, 9 Tex. 408.

[5] Tucker v. Van Winkle, 142 Mich. 210, 105 N. W. 607.

[6] Brown v. Reeves & Co., 31 Ind. App. 517, 68 N. E. 604.

[7] Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112. See, also, Smith v. Auditor General, 138 Mich. 582, 101 N. W. 807.

[8] Rafferty v. Davis, 102 Pac. 305.

[9] People v. Cone, 48 Cal. 427.

[1] Lafferty's Lessee v. Byers, 5 Ohio, 458, per Lane, J.

a sale.[2] In one case, the quantity of land sold, one hundred acres, was described as being the north part of lots seven and eight, section one, township thirteen, range three. The land was sold as an entire tract, and the quantity of land in each lot was not given. The law in force at the time required the list to set forth "the number of acres in each *particular* tract, lot, section, or subdivision thereof, or the number of entry, location, survey, or watercourse, as the nature of the general or particular surveys may require, so as completely to designate or identify the same." It appeared from the evidence introduced that the two lots adjoined each other on the east and west, and had the land been conveyed by a deed by a similar description, it could have been found without difficulty. But the court said that "although this description might be sufficiently certain in a deed, it does not follow that it is sufficiently certain to sustain a sale for taxes. In order that such sales may be sustained, it is necessary that all the requisitions of the law under which they are made should have been complied with, and any departure from these requisitions will defeat the sale." The court accordingly held that the sale was void, and that the deed made in pursuance of it did not transfer any title.[3] Where the notice is for the sale by the state of all the interest possessed by it in and to 6,500 acres of land in a numbered township, Indian purchase, a deed made by the state giving the same description and nothing more, fails to identify any specific parcel, and the title of the state does not pass.[4]

§ 1377. **Further Illustrations.**—A description, giving the original quantity of land at a certain number of acres

[2] Lessee of Massie's Heirs v. Long, 2 Ohio, 287, 15 Am. Dec. 547.

[3] Lessee of Perkins v. Dibble, 10 Ohio, 433, 440, 36 Am. Dec. 97.

[4] Millett v. Mullen, 95 Me. 400, 49 Atl. 871. See, also, Boles v. McNeil, 66 Ark. 422, 51 S. W. 66; Mann v. Carson, 120 Mich. 631, 79 N. W. 941.

and the quantity to be sold at a less number, is insufficient.[5] So where two tenants in common owned a lot, an advertisement purporting to sell "half of lot No. 4, in square No. 491," is not sufficient, and a sale, made in pursuance of this notice is void.[6] Said Mr. Justice McLean: "It is necessary for the interest of the owner that he should be informed of a proceeding which, unless arrested by the payment of the tax, would divest him of his property. And it was of equal, if not greater, importance, that the property should be so definitely described, that no purchaser could be at a loss to estimate its value. It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property; yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to bidders on the day of sale by the auctioneer. . . . . What would be understood by such a description? Suppose half a square had been advertised, it not having been divided into lots, would it convey that certainty to the public, as to the precise property about to be sold, that would enable anyone to form an opinion of its value? No one could suppose that an undivided half of the square was to be sold under the notice; and which half was offered could not be determined from the advertisement.

[5] Lafferty's Lessee v. Byers, 5 Ohio, 458. In this case the land in the listing for taxation and the advertisement for sale was thus described:

Name	No. of Entry	Original Proprietor	Original Quantity.	Water-course.	Acre.	Rate	Tax.
John Haines.	4,401	John Haines.	170	Mad River.	73	2	3922.

[6] Ronkendorff v. Taylor's Lessee, 4 Peters, 350, 7 L. ed. 883.

Would this be a notice under the requisites of the law? The value of a lot or half lot depends upon its situation. If one of the half lots front two streets in a populous part of the city, it is of much higher value than the other half. And this difference in value may still be greater, if the lot be situated near the middle of a square, fronting the street, and it be divided so as to cut off one-half of it from the street. It will thus be seen that it is not a matter of small importance to the person who wishes to purchase, to know which half of a lot is offered for sale; and as any uncertainty in this matter must materially affect the value of the property at the sale, it is of great importance to the owner that the description should be definite. That an undivided moiety of a lot may be sold for taxes, has already been stated. But would any one understand that one-half of lot No. 4 means an undivided moiety? In all cities half lots are as common as whole ones; and when a half lot is spoken of, we understand it to be a piece of ground half the size of an entire lot, and of as definite boundaries." [7] Land was described as "Caleb Cross' heirs, six hundred and forty, entry No. 1,328, lying in the twelfth district, in the first range, ninth section." The statute provided that the land should "be specially and particularly described in such return and advertisement; and it shall be the duty of the collector of public taxes to give the number of the grant or entry, with all special calls in his advertisement." Concerning this description the court said: "The words of the section, indeed, are that it shall be described by a reference to the 'grant or entry'; the meaning of which is that if the land be granted, the number of the grant shall be referred to, and if it be not granted, that the number of the entry shall be referred to, and not that in case of granted land a reference may be made by the officer, at his election, to the number either of the grant or entry." [8]

[7] In Ronkendorff v. Taylor's Lessee, 4 Peters, 350, 362, 7 L. ed. 883, 886.

[8] Gardner v. Brown, 20 Tenn. (1 Humph.) 354.

§ 1378. **Continued.**—A statement at the head of a notice cannot be considered as referring to the premises to be sold, or aid in the description. Such a statement merely identifies the officer's office from which and the time when the notice issued. A notice of sale describing the property as "Roberts and Randall's Addition, lot 11, blk. 20, lot, 12, blk. 20," and failing to describe such lots or the addition as being in a city or a county, and not referring in any manner to the county except the notice was headed with the title of the officer and the county in which he acted, is insufficient.[9] The following descriptions have been held to be insufficient: "Part of the two river lots joining N. Walker's and Pettingill farm, lots 1 and 2, range 1, 100 acres." "A piece of land northwesterly of and adjoining S. G. Wait's land, lot 5, range 3, 6 acres." "One-half of lot northwesterly of Luther Jackson's farm, lot 2, range 2, 50 acres." "The lot adjoining B. Walton's farm, lot 1, range 2, 85 acres." "A piece of land between A. J. Churchill and J. H. Weymouth, part of lot 7, range 3, 27 acres." "One-half island opposite S. Holmes', 15 acres." "A part of E. A. Pollard's farm, lot 6, range 5, 25 acres." "Part of lot adjoining Josiah Hall's, lot 1, range 5, 40 acres." "The lot being southerly and adjoining J. P. Hopkins' and S. R. Newell's wood land, lot 3, range 4, 60 acres." "Half of lot westerly of J. S. Holmes' farm and adjoining it, lot 4, range 2, 50 acres." "A piece of land easterly of Worthly Pond, joining W. Harlen's farm, lot 7, range 5, 8 acres."[1] But the following descriptions have

[9] Bidwell v. Webb, 10 Minn. 59, 88 Am. Dec. 56. In this case the notice was headed, "Auditor's Office, Ramsey County, Minn., St. Paul, Dec. 8, 1862." The court said: "It is impossible to determine from the description of the land in the notice what addition of Roberts and Randall is referred to. It may be an addition to St. Paul, St. Anthony, or any other place—it may be in Ramsey or any other county. The plaintiff was not informed by this notice that it was his land which was taxed, nor could bidders ascertain from the notice the locality of the land."

[1] Greene v. Lunt, 58 Me. 518. Said Mr. Justice Danforth, in delivering the opinion of the court:

been held to be sufficient: "The island opposite N. Walker's and above Alden's Ferry." "Second lot from S. Holmes', lot 4, range 3, 100 acres." "Second lot from D. L. Conant's land, lot 3, range 3, 85 acres." "Larry Farm on the hill, formerly owned by S. Roberts, being part of lot 1, in ranges 3 and 4, 75 acres;" and "second lot from J. Lunt's, lot 6, range 3, 100 acres." [2] The land is not sufficiently identified in a notice of a tax sale where it is described as "S. W. 4 of S. E. 4, of section 32, town 141, range 50." [3] But, if a person of ordinary intelligence can identify the land with reasonable certainty, the description will be sufficient.[4] If the context shows that the land in the state is referred to, and there

"The collector must obtain his information from the assessment. He has no authority to add to or take from it; nor can the assessors, after the completion of the tax, add to the description so as to make that certain which was before uncertain. The assessment must be complete in and of itself as much as deed or contract. Parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth, but no further. It cannot supply any deficiency in the butts or bounds. These must be ascertained from what is written, and from that alone. We may suppose, as contended in the argument, that the assessors intended to assess the lot or portions of the lot owned by the person taxed, or we may learn that fact from those officers themselves. But this is not a question of intention, but one of fact. What did they do? What is the specific lot upon which the tax is made? Until we can answer these questions, and from the record, we are utterly unable to ascertain the lot to which the lien attaches, and the one to be sold. . . . Such a description, however it may be in a deed, when the grantor makes his own bargain, and can enter into such a contract as he pleases, is plainly insufficient in a tax title, where the lien is fixed by the assessment, and nothing is left to the discretion or election of the collector or purchaser as to the location of the particular lot sold, or the specific acres in the lot to whichthesale shall attach. Under such a description the person assessed could not tell whether it was his property, or that of a stranger which was taxed. Nor would the purchaser have sufficient knowledge of the identity of the land to enable him to bid intelligently."

[2] Greene v. Lunt, 58 Me. 518.

[3] Lee v. Crawford, 10 N. D. 482, 88 N. W. 97.

[4] Doherty v. Real Estate Title Ins. & Trust Co., 85 Minn. 518, 89 N. W. 853.

is but one tract in the state to which the description is applicable the description is sufficient, although another tract situated in another State also answers the description.[5] If the statute requires that the notice should contain a list of the lands to be sold and the amount of taxes due, and the lots affected are situated in R. Tyler's addition to the city of W. and the notice as published amended with the heading "Village of L," giving a description of town lots, and then the heading "R. S. Tyler's addition," but failing to mention the town and seemingly relating back to the Village of L, the notice of sale is not a sufficient compliance with the statute.[6]

§ 1379. **Capability of identification.**—Land was described as "1,013.86 acres of land, being a portion of the San Pedro Rancho, bounded as follows: North by the lands of James Regan and others; east by the line of the San Pedro Rancho; south by the Pacific Ocean; and west by the lands of Richard Tobin. Also fifteen acres of land, being a portion of the San Pedro Rancho, bounded on the north by the lands of Richard Tobin; south by the lands of Felton and Patterson; west by the Pacific Ocean; east by the lands of Richard Tobin." At the time this assessment was made, the statute required that land should be assessed "by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon." The court held the description insufficient, because, in the first piece, the land was described as being bounded "on the north by the lands of James Regan *and others*." "A more uncertain and indefinite boundary than this," said the court, "can scarcely be conceived. Who the 'others' are whose lands are said to

[5] Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, affirming 90 N. W. 255, 64 Neb. 533, 101 Am. St. Rep. 592.

[6] Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481.

bound the tract attempted to be assessed, does not appear upon the face of the assessment, and extrinsic evidence, as we have seen, cannot be resorted to for the purpose of showing." The court also held that the south boundary of the second piece of property described was but little, if any, more certain; neither description was sufficient.[7] If the land cannot be identified from the description in the assessment, the assessment is void, and so is a sale subsequently made. The defect cannot be cured by an accurate description of the land in the report of sale.[8] Separate parcels of land should be separately assessed.[9]

§ 1380. Other requisites of the notice of sale.—If the statute requires that the names of the owners must be stated

[7] People v. Mahoney, 55 Cal. 286. See, also, on the question of description, Dike v. Lewis, 4 Denio, 238; Keane v. Cannovan, 21 Cal. 302, 82 Am. Dec. 738; Huntington v. C. P. R. R., 2 Saw. 503; Hannel v. Smith, 15 Ohio, 134; Orton v. Noonan, 23 Wis. 102; San Francisco v. Quackenbush, 53 Cal. 52; Amberg v. Rogers, 9 Mich. 332; Brown v. Dinsmoor, 3 N. H. 103; Eastman v. Little, 5 N. H. 290; Douglas v. Daingerfield, 10 Ohio, 152; People v. Hyde, 48 Cal. 431; Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Curtis v. Supervisors, 22 Wis. 167; Tripp v. Ide, 3 R. I. 51; People v. Pico, 20 Cal. 595; Lachman v. Clark, 14 Cal. 131; People v. Mariposa Co., 31 Cal. 196; Barton v. Gilchrist, 19 W. Va. 223; Nason v. Ricker, 63 Me. 381; Thibodaux v. Keller, 29 La. Ann. 508; Vaughan v. Stone, 55 Iowa, 213; Iowa etc. Co. v. County of Sac, 39 Iowa, 124; Shawler v. Johnson, 52 Iowa, 472; Chicago etc. R. R. Co. v. Carroll County, 41 Iowa, 153; Lake County v. Sulphur Bank etc. Co., 66 Cal. 17; Gachett v. McCall, 50 Ala. 307; Poindexter v. Doolittle, 54 Iowa, 52; Garrick v. Chamberlain, 97 Ill. 620; Rougelot v. Quick, 34 La. Ann. 123; Milner v. Clark, 61 Ala. 258; Crane v. Randolph, 30 Ark. 579; Oliver v. Robinson, 58 Ala. 46.

[8] Mayor etc. of Morristown v. King, 11 Lea (Tenn.), 669. A description in the assessment as "two hundred acres of land known as the lands of the late Israel Wiggins," is sufficiently certain: Driggers v. Cassaday, 71 Ala. 529. But a description as "two hundred acres of land lying in Dale county," is insufficient: Driggers v. Cassaday, 71 Ala. 529.

[9] Terrill v. Groves, 18 Cal. 151; Young v. Joslin, 13 R. I. 675; Cooley on Taxation (2d ed.), 400; Shimmin v. Inman, 26 Me. 228; County Commrs. of Alleghany Co. v. Union Mfg. Co., 61 Md. 545.

in the notice, the statute must be complied with.[1] If the assessment gives the name of one person as the owner, and the notice the name of another, the notice is defective.[2] If the statute requires the list to be posted, this cannot be omitted.[3] Where a statute required that a notice inviting sealed proposals for improving a street should be conspicuously posted for five days in the office of the officer having charge of the streets, it was decided that the notice must remain posted in that office for five official days. As the court construed the statute, the notice must be posted before 9 o'clock A. M. of the first day, the hour at which the office is to be opened, and must remain posted during the whole of the first, second, third, fourth, and until 4 o'clock of the fifth day, at which hour the closing of the office is authorized by statute.[4]

§ 1381. Same subject continued.—A requirement of the statute that the notice of sale shall be published at the courthouse door must be complied with.[5] If the statute requires a notice to be given to the owners, and an estate is owned by several heirs, a collector of taxes, levying upon the entire estate and advertising it for sale for nonpayment of

[1] Shimmin v. Inman, 26 Me. 228; Corporation of Washington v. Pratt, 8 Wheat. 681, 5 L. ed. 714.

[2] Bettison v. Budd, 21 Ark. 578. And see Workingmen's Bank v. Lannes, 30 La. Ann. 871; Alvord v. Collin, 20 Pick. 418.

[3] Yenda v. Wheeler, 9 Tex. 408; Pitts v. Booth, 15 Tex. 453.

[4] Himmelmann v. Cahn, 49 Cal. 285; Brooks v. Satterlee, 49 Cal. 289. In the first case, Mr. Justice Rhodes dissented, saying: "As I construe the statute, no greater period is required for the posting than for the publication of the notice. The statute has assigned one and the same period for each, and I see nothing in the nature of those acts which requires or authorizes the court to regard fractions of a day in one case, and not in the other, and thus require a longer period for the posting than for the publication of the notice."

We think that the court carry the strictness of the rule too far in requiring proof of the kind indicated. We believe, with Judge Rhodes, that the time of publication and the time of posting should be measured by the same rule, and that fractions of a day should not be considered in computing time.

[5] Clarke v. Rowan, 53 Ala. 400.

taxes, must give notice to all the heirs. If he gives notice to only one of the heirs, the sale is void for a failure to give notice to the other heirs.[6] The court intimated, however, that if the collector had levied on the interest of the heir served with notice, and advertised for sale that interest only, the sale might have been good. But as the proceeding was against the whole estate, and upon all the interest of every heir, the sale of the interest of the heir served with notice would not have been warranted by the advertisement published, or by the notice served, and the heir served with notice could have taken this objection, if a sale of his interest alone had been made.[7] The Illinois statute requires, before the expiration of the time for redemption, that notice shall be served on every person in actual possession or occupancy of the property, and also the person in whose name the same was taxed, or specially assessed, if, upon diligent inquiry, he can be found in the county. Under this statute it is held that where a lot has not been assessed in the name of any person, and notice of its sale for taxes has been served upon the only person in possession of the property it will be sufficient.[8] The act of Congress of 1866, in relation to internal revenue, provided that in case sufficient personal property could not be found to satisfy the taxes, the collector was authorized to collect the same by seizure and sales of real estate. The statute also provided that the officer making such seizure and sale should "give notice to the person whose estate is proposed to be sold, by giving him in hand, or by leaving at his last or usual place of abode, if he has any such within the collection district where said estate is situated, a notice, in writing, stating what particular estate is proposed to be sold, describing the same with reasonable certainty, and the time when and place where said officer proposes to sell the same." A deed offered in evidence recited that notice was served "by leaving

[6] Thurston v. Miller, 10 R. I. 358.
[7] Thurston v. Miller, 10 R. I. 358.
[8] Garrick v. Chamberlain, 97 Ill. 620; Gage v. Bailey, 102 Ill. 11.

a copy of the notice as provided by law, at the domicile, on the estate seized as above described, and also with the administrator." The tax was a succession tax. The court held that the notice was insufficient because it did not appear "that the domicile on the estate seized was the last or usual place of abode of any of the successors," and because it inferentially appeared from other recitals in the deed that a portion of the successors resided in the same collection district in which the estate sold was situated.[9]

§ 1382. **Continued.**—A collector's advertisement must be signed by him as collector. "Clearly this is an official act, and it is difficult to see how any one can act officially on paper, and not so state on the paper. The act assessing this tax was a private act. The advertisement, in this case, was not signed by Spaulding, as collector, nor did it in any way so import, and the landholders were, therefore, no way informed that the signer of that advertisement had any more right than any other man to give such notice, nor that, if he had such power, he undertook to exercise it. It is not true that every man is to be presumed to be clothed with and to be exercising an official capacity, because it seems to be needed for what he is attempting. Such a principle would sweep away all official signatures and designations."[1] An advertisement of sale which states erroneously the year for which the tax is assessed, is fatally defective.[2] In North Carolina, the mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given.[3] Where property is assessed and advertised for sale in the name of two persons, the proceedings are void when such persons named as joint owners never had title to the prop-

[9] Peyrie v. Schreiber, 66 Mo. 38.

[1] Spear v. Ditty, 9 Vt. 282. See Broughton v. Journeay, 51 Pa. St. 31.

[2] Knowlton v. Moore, 136 Mass. 32.

[3] Whitehurst v. Gaskill, 69 N. C. 449, 12 Am. Rep. 655.

erty, but it had been owned always by one of them only.[4] Under a Maine statute, requiring the officer to publish in certain newspapers a list of the land to be sold, with the amount of the unpaid taxes, interest, and costs, on each parcel, three weeks successively, within three months before the time of sale, he stated in his record for the purpose of showing a compliance with this requirement: "Previous to said sale, and within three months therefrom, I caused notice of the time and place of such sale, and lists of said tracts intended for sale, with the amount of such unpaid taxes, interest, and cost on each parcel, to be published three weeks successively, as follows, viz: (1) In the Kennebec Journal, the State paper, a list of all said tracts. (2) In the Ellsworth American, a newspaper printed in the county of Hancock, a list of all said tracts which lie in that county." While the record stated that a publication was made of the amount of the unpaid taxes, interest, and cost on each parcel, it failed to state where the publication was made. The record did state that and lists were published in the papers enumeratd, but contained no positive and certain statement that anything else was advertised. For these reasons the court held the record insufficient.[5] The statement in an affidavit by the publisher of a newspaper, that a notice was published in the paper for a certain length of time, is presumptive evidence, at least, that affiant knew the fact of such publication.[6]

[4] Denégre v. Gérac, 35 La. Ann. 952.

[5] Tolman v. Hobbs, 68 Me. 316.

[6] Hart v. Smith, 44 Wis. 213. See, also, as to notice of sale, Watkins v. Inge, 24 Kan. 612; City Railway Co. v. Chesney, 30 Kan. 199; Hastings v. Columbus, 42 Ohio St. 585; Cuttle v. Brockway, 32 Pa. St. 45; Leland v. Bennett, 5 Hill, 286; New Orleans v. Cordeviolle, 10 La. Ann. 723; Virden v. Bowers, 55 Miss. 1; Ormsby v. Louisville, 79 Ky. 197; Appeal of Powers, 29 Mich. 504; Thweatt v. Black, 30 Ark. 732; Magee v. Commonwealth, 46 Pa. St. 358; Noyes v. Haverhill, 11 Cush, 338; Kelly v. Craig, 5 Ired. 129; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Smith v. Messer, 17 N. H. 420; Sutton v. Calhoun, 14 La. Ann. 209; Pierce v. Richardson, 37 N. H. 306; Porter v. Whitney, 1

§ 1383. **Authority to sell.**—There is no authority to sell unless all the precedent material acts required by statute have been performed.[7] If the statute requires the county treasurer and collector to return under oath the list of delinquent lands to the county auditor, there can, in the absence of such return, be no forfeiture of such lands for nonpayment of taxes.[8] If the statute requires a special demand to be made before sale, the statute must be observed or the invalidity of the sale will be the result.[9]

§ 1384. **Limitation on sale.**—Where the statute limits the time within which a sale can be made to two years from the date of the collector's warrant, a sale made more than two years from the date of such warrant is void, although the land was duly seized and advertised within two years.[1] A precept did not describe any land except by reference to an annexed schedule, in which the several tracts of land ordered to be sold were particularized. In a suit in ejectment, the precept was offered in evidence, but no schedule was annexed to it, nor was any proof offered that any such schedule ever existed. The court decided that the precept did not appear to have any connection with the land in dispute, or to confer on the officer any authority to sell it, and hence was irrelevant and inadmissible in evidence.[2] The officer acts under a statutory power, which must be strictly construed, and he must perform the acts required by the statute

Greenl. 306; Langdon v. Poor, 20 Vt. 13; Hannell v. Smith, 15 Ohio, 134; Ex parte Tax Sale, 42 Md. 196; Scott v. Watkins, 22 Ark. 556; Ogden v. Harrington, 6 McLean, 418.

[7] Bishop v. Lovan, 4 Mon. B. 116; Garrett v. White, 3 Ired. Eq. 131. See Miner v. McLean, 4 McLean, 138; Homer v. Cilley, 14 N. H. 85; Succession of Trainor, 7 La. Ann. 150; Hannel v. Smith, 15 Ohio, 134; Gossett v. Kent, 19 Ark. 602; Laugohr v. Smith, 81 Ind. 495; Kelley v. Craig, 5 Ired. 129.

[8] Miner v. McLean, 4 McLean, 138.

[9] Lathrop v. Howley, 50 Iowa, 39.

[1] Usher v. Taft, 33 Me. 199.

[2] Stewart v. Graffies, 8 Serg. & R. 344.

within the time prescribed.[3] As the power to sell land for the nonpayment of taxes is given on the condition that it must be exercised within a certain time, the legislature cannot give him power to sell after the time allowed by law for that purpose has expired.[4] A tax deed, showing on its face that the land was sold on a day different from that specified by statute, is void.[5]

§ 1385. **Public sale.**—The sale must be public.[6] If several persons agree among themselves that they will advance the money to buy at a sale for taxes, and that one of them shall purchase so as to prevent competition, and that the land shall subsequently be divided among them, equity will relieve against the purchase, as such an agreement is fraudulent.[7] "Such combinations," said the court, "have necessarily a direct tendency to prevent competition, which it is the duty of the legislature and the policy of the law to encourage. Over a sale of this description, the owner has no control—he cannot refuse a bid or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the State. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the value of the property. This being the case, any combination which has

[3] Doe v. Allen, 67 N. C. 346.

[4] Doe v. Allen, 67 N. C. 346.

[5] Conrad v. Darden, 4 Yerg. 307. See, also, on the question of the authority of the officer to sell, Avery v. Rose, 4 Dev. 549; Iron Mfg. Co. v. Barron, 3 N. H. 36; Thompson v. Rogers, 4 La. 9; Minor v. Natchez, 4 Smedes & M. 627, 43 Am. Dec. 488; Lessee of Holt's Heirs v. Hemphill's Heirs, 3 Ohio, 232; Hinman v. Pope, 1 Gilm. 131; Messenger v. Germain, 1 Gilm. 631; Pentland v. Stewart, 4 Dev. & B. 386; Proprietors of Cardigan v. Page, 6 N. H. 182; Hollister v. Bennett, 9 Ohio, 83; Miller v. Hale, 26 Pa. St. 432; Flint v. Sawyer, 30 Me. 226; Spiller v. Baumgard, 4 La. 206.

[6] Miller v. Corbin, 46 Iowa, 150; Jenks v. Wright, 61 Pa. St. 410; Stevens v. Williams, 70 Ind. 536.

[7] Dudley v. Little, 2 Ohio, 504, 15 Am. Dec. 575.

a tendency to reduce the price of the property, by preventing competition, must operate as a fraud on the owner. The effects of such combinations cannot be controlled by any vigilance on the part of the owner. It frequently happens that large quantities of land are offered for sale on these occasions, in the absence and without the knowledge of the owners; and if such combinations are permitted, all the persons present at the sale might form themselves into companies, and by an agreement not to bid against each other, might purchase in the whole of every tract offered, for the amount of tax due on it. We do not mean to say that partners cannot purchase property at a tax sale, for the convenience of the business they are engaged in, when speculation is not their object; but that a partnership or combination cannot legally be formed for the purpose of making such purchases."[8] A person may act as the agent of two purchasers at a tax sale. This cannot of

[8] Dudley v. Little, 2 Ohio, 504, 15 Am. Dec. 575. This case was cited and followed by the Supreme Court of the United States in the case of Slater v. Maxwell, 6 Wall. 268, in which, on page 276, 18 L. ed. 796, 799, Mr. Justice Field said: "It is essential to the validity of tax sales, not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be in all such cases strictly exacted. The owner is seldom present, and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property, and thus a great temptation is presented to parties to exclude competition at the sale, and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner. When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment, whether the deed be the ground upon which the recovery of the premises is sought by the purchaser, or be relied upon to defeat a recovery by the owner. In some instances equity will interpose in cases of this kind, as where the deed is by statute made evidence

itself constitute a fraudulent and illegal combination.[9] If a statement is made at the sale which prevents competition, the title will not pass.[1] If there is read at the sale the advertisement stating the least quantity of land which any bidder will buy will be sold, and the officer calls upon those who are present to specify the least quantity which any of them will purchase, there is a compliance with the statute.[2] The officer making the sale has no power to impose conditions or make stipulations relating to the sale not authorized by law.[3]

§ 1386. **Evidence.**—The existence of a fraudulent combination among bidders cannot be established by proof that there were three bidders at a tax sale, and that they did not bid one against another. The court is not to indulge in the presumption of fraud, but in the absence of evidence the court is to presume the contrary. In such a case a bidder might have obtained all the land that he desired without being compelled to bid against anyone else.[4] A tax sale is not rendered invalid by the fact that both principal and agent are present and bid at the same sale.[5] A sale will be invalidated by an agreement between persons to prevent competition among the bidders.[6] But the fact that there was little competition, though a number of bidders were present at the sale and some of them bid on the same tract, does not justify the inference of the existence of a fraudulent combination among the bid-

of title in the purchaser, or the preliminary proceedings are regular upon their face, and extrinsic evidence is required to show their invalidity. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief."

[9] Pearson v. Robinson, 44 Iowa, 413.

[1] Bickford v. Poor, 68 N. H. 443, 44 Atl. 600.

[2] Tieman v. Johnston, 114 La. 112, 38 So. 75.

[3] Board of Commissioners etc. v. Miles, 7 Neb. 118.

[4] Beeson v. Johns, 59 Iowa, 166.

[5] Jury v. Day, 54 Iowa, 573.

[6] Morrison v. Bank of Commerce, 81 Ind. 335.

ders.[7] Nor is a sale invalidated by the fact that two persons who held liens on the property, agreed for the protection of their liens to bid jointly. Such an agreement did not necessarily prevent competition among the bidders.[8]

§ 1387. **Enjoining execution of deed.**—If the collector and principal bidders enter into a combination to prevent competition, and agree that the lands shall be struck off to one of the parties for the amounts taxed against the respective tracts, the court, if bidding has been thereby prevented, will enjoin the collector from making a deed to a party to the fraudulent combination.[9] A good cause of action is stated in a complaint which alleged that, in violation of law, the assessors of a city expressly and intentionally assessed vacant lands at a sum far in excess of what would be a proper proposition, as compared with occupied lands, for the purpose of increasing the improvement of property in the city.[1] If the court finds that the plaintiff is entitled to no relief, it has no jurisdiction to continue a temporary restraining order in force.[2] Where it is alleged that part of the levy is invalid, but it is admitted that the residue is valid, a tender must be made by the property owner to pay the valid portion of the tax before he can obtain relief.[3] Mere irregularity in the proceedings will not be sufficient to justify restraining the execution of a tax deed.[4] If it is impossible to ascertain by computation the amount of taxes justly chargeable, it is not necessary to make or allege a tender.[5] The execution of a tax deed may be enforced by mandamus.[6]

[7] Gallaher v. Head, 108 Iowa, 588, 79 N. W. 387.

[8] Morrison v. Bank of Commerce, 81 Ind. 355.

[9] Gage v. Graham, 57 Ill. 144.

[1] Anderson v. Douglas County, 98 Wis. 393, 74 N. W. 109.

[2] Bitzer v. Becke, 89 N. W. 193.

[3] Grant v. Cornell, 147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173.

[4] Challis v. Board of Commissioners, etc., 15 Kan. 49; Stebbins v. Challis, 15 Kan. 55.

[5] Anderson v. Douglas County, 98 Wis. 393, 74 N. W. 109.

[6] State v. Bradshaw, 39 Fla. 137, 22 So. 296; Clippinger v. Tuller, 10 Kan. 377.

§ 1388. **Agreement to receive portion of taxes.**—An agreement by an officer with purchasers to receive only a portion of the taxes due at the sale is illegal. A sale pursuant to such an agreement is also illegal, and cannot be rendered valid by a subsequent law declaring the sale and agreement to be valid.[7] If, after the adjournment of a tax sale, the officer executes certificates without a sale to a pretended purchaser, in compliance with an antecedent private agreement with him, the tax title is invalid, and the deed founded upon such certificate is entirely void.[8]

§ 1389. **Conduct of officer.**—The officer's duty requires him, at the time and place specified in the statute, to offer each tract of land separately, so as to secure a fair competition, and to collect the taxes with a loss to the owner as small as possible. The officer cannot allow a person to choose from the tax list a part of the lands delinquent, and bec the purchaser of the whole for the taxes payable, without competition. Such an agreement is contrary to equity, and a fraud upon the owner.[9] As another illustration of this same principle, if the officer, instead of selling the property at public auction, allows persons to hand to him slips of paper containing a description of the lands which they desire to purchase, and the officer, at his convenience, enters these lands on his books as though they had been regularly sold at public sale, the sale is illegal.[1] An agreement to take turns at bidding so as to have but one bidder for a tract when offered for sale, invalidates the sale.[2] Though there may be no positive agree-

[7] Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240.

[8] Truesdell v. Green, 57 Iowa, 215. A person purchasing by warranty deed, for value and without notice, in such a case will not be treated as an innocent purchaser: Truesdell v. Green, 57 Iowa, 215.

[9] Brown v. Hogle, 30 Ill. 119.

[1] Young v. Rheinecher, 25 Kan. 366. A tax deed based on such a sale is at least voidable: Young v. Rheinecher, 25 Kan. 366.

[2] Springer v. Bartle, 46 Iowa, 688.

ment, a tacit understanding among bidders that they will not bid against each other, renders the sale invalid.[3] In order to secure fair competition the officer cannot buy at the sale.[4] Unless authorized by statute, a city cannot buy at a tax sale.[5] In Iowa, separate sales at the same time for several separate years are held not to be authorized.[6] A title acquired at a sale for taxes of one year, is superior to a title acquired by a sale for taxes for a prior year.[7]

§ 1390. **Innocent purchaser.**—But a subsequent purchaser for value, and without notice of the fraud of a combination to prevent competition, will acquire a valid title.[8] The sale is not rendered void by such a combination, but

[3] Johns v. Thomas, 47 Iowa, 141. See, also, generally, Chandler v. Keeler, 46 Iowa, 596; Butler v. Delano, 42 Iowa, 350; Bullis v. Marsh, 56 Iowa, 747; Besore v. Dosh, 43 Iowa, 211; Harris v. Drought, 24 Kan. 524; Townsend etc. Bank v. Todd, 47 Conn. 190; Kerwer v. Allen, 31 Iowa, 578; Singer Mfg. Co. v. Yarger, 12 Fed. Rep. 487.

[4] Clute v. Barron, 2 Mich. 192; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; McLeod v. Burkhalter, 57 Miss. 65; Payson v. Hall, 30 Me. 319; Taylor v. Stringer, 1 Gratt. 158; Chandler v. Moulton, 33 Vt. 245. But see for exceptions and modifications of this rule, Hare v. Carnall, 39 Ark. 196; Fox v. Cash, 11 Pa. St. 207; O'Reilly v. Holt, 4 Woods, 645; Wells v. Jackson Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Everett v. Beebe, 37 Iowa, 452; Wilkins v. Benning, 51 Ga. 9; Haxton v. Harris, 19 Kan. 511; Harris v. Drought, 24 Kan. 524; Cole v. Moore, 34 Ark. 582; Ellis v. Peck, 45 Iowa, 112.

[5] Logansport v. Humphrey, 84 Ind. 467; Champaign v. Harmon, 98 Ill. 491.

[6] Shoemaker v. Lacey, 38 Iowa, 277.

[7] Chandler v. Dunn, 50 Cal. 15.

[8] Van Shaack v. Robbins, 36 Iowa, 201; Sibley v. Bullis, 40 Iowa, 429; Martin v. Ragsdale, 49 Iowa, 589; Huston v. Markley, 49 Iowa, 162. In Van Shaack v. Robbins, 36 Iowa, 201, 205, the court said: "The manifest and unmistakable purpose and intent of the entire revenue act is to give value to and confidence in tax titles. This value and confidence would be destroyed, and the intent defeated by a holding which would render any tax title in the hands of an innocent purchaser wholly worthless and void, upon the showing of a fact which might not be in his power to ascertain in advance of his purchase."

merely voidable.[9] But a grantee under a quitclaim deed from the assignee of a tax certificate, void on account of the existence of a fraudulent combination at the sale, cannot claim protection as an innocent purchaser.[1] If certain lands were purchased at a sale under a fraudulent combination by certain parties, the purchase of other lands by other parties at the same sale is not affected thereby.[2] If such were not the law, no one would be safe in purchasing a tax title.

§ 1391. Sale for cash.—An officer must sell for cash. He has no power to give credit.[3] Where the officer ac-

[9] Van Shaack v. Robbins, 36 Iowa, 201.

[1] Watson v. Phelps, 40 Iowa, 482.

[2] Martin v. Cole, 38 Iowa, 141; Case v. Dean, 16 Mich. 12. And see Eldridge v. Kuehl, 27 Iowa, 160.

[3] Dickson v. Burckmyer, 67 S. C. 526, 46 S. E. 346; Cushing v. Longfellow, 26 Me. 306. Said Mr. Chief Justice Whitman: "But the county treasurer, who made the sale to the defendant, was a ministerial officer. His acts may be examined. Parol testimony is admissible to affect them. He was bound to a strict performance of his duties. The proprietors of the township, as well as the public, were interested in his doings. His acts should have been no otherwise in reference to the one than to the other. It appears that in making the sale he stipulated to give to the purchaser a credit of something like two, four, and six months, for the purchase money. This he was not authorized by law to do. He should have sold for cash down. Public agents authorized to make sales, in the absence of any express authority to the contrary, can do no otherwise. Those who deal with them are bound to take notice that such is the case, and become privy to the erroneous proceeding. If one deals with a private agent, even, who has not an express or implied authority to sell on credit, the title to any article purchased of such agent will not vest in the vendee, against the principal of the agent. Public agents can seldom, if ever, derive authority from implication. The plaintiffs were interested, in this instance, on having sale made for cash. They had a right of redemption. The sale on credit might well be believed to enhance the price; so that they might, if the sale could be upheld, be compelled to pay a much greater sum for redemption than would otherwise be requisite for the purpose. They might, besides, be under the necessity, in order to a redemption, to pay the amount to one who had in fact paid noth-

cepts the bid, the sale is not void because the sum bid is not paid until some time after the sale.[4] It was held in a case in Arkansas, that a collector could not receive Tennessee bank paper in payment of taxes.[5] An officer cannot receive in payment for the amount of taxes and costs the promissory note of the purchaser.[6] "I am aware," said Mr. Justice Burnside, "that there is much management and fraudulent perversion of the law about purchasing at treasurer's sales. It is our duty to discountenance it. The intention of the legislature is plainly and clearly expressed that, as soon as the bid is made and the hammer falls, it is the duty of the purchaser to pay the taxes and costs. If not, for the treasurer to compel the payment before the deed is acknowledged."[7] But, if there is no agreement before the sale that a credit is to be given, and, after the sale, the officer receives a note for part of the purchase money, the sale does not become invalid.[8]

§ 1392. Sale to highest bidder.—An officer selling land at auction must sell to the highest bidder, as the term is used in tax proceedings.[9] As the term is generally used in the various statutes, the highest bidder means the person who will pay the taxes due for the least quantity of the land.[1] A deed showing that a sale was made to a person as one "who made the highest bid therefor," and not as one who would take the least quantity of the land for the taxes due, is

ing for the land, and who might subsequently fail to make payment for it; and so the land be subject to a resale, in order to obtain funds to open and construct the road."

[4] Anderson v. Rider, 46 Cal. 135.

[5] Hunt v. McFadgen, 20 Ark. 277.

[6] Donnel v. Bellas, 34 Pa. St. 157, 10 Pa. St. 341.

[7] In Donnel v. Bellas, 10 Pa. St. 341, 346.

[8] Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525.

[9] See Bean v. Thompson, 19 N. H. 290, 49 Am. Dec. 154; Maxcy v. Clabaugh, 6 Ill. 26; Cardigan Proprietors v. Page, 6 N. H. 182.

[1] Lovejoy v. Lunt, 48 Me. 377. And see Peters v. Healsey, 10 Watts, 208.

void.[2] "The provision of the statute, that he shall only sell the smallest quantity of the property which any purchaser will take, and pay the judgment and costs, is intended for the protection of the taxpayer. It is almost the only security afforded him against the sacrifice of his property in his absence, even though the assessment be irregular and the tax illegal." [3] Under the Iowa statute, a purchaser at a tax sale offering to pay the taxes for less than the whole tract, obtains an undivided interest in the land.[4] If the bidder offers to pay the taxes for less than the whole lot, the officer is not required to indicate to the bidders the beginning corner from which the least quantity is to be run off.[5] If the tax has been lawfully discharged, a tax sale is void.[6] The land must be liable for the tax to render a tax sale valid.[7] Statutes, however, exempting property from taxation must receive a strict construction.[8]

[2] Hewell v. Lane, 53 Cal. 213; Carpenter v. Gann, 51 Cal. 193; Mora v. Nunez, 7 Saw. 455.

[3] Per Mr. Justice Field, in French v. Edwards, 13 Wall. 506, 511, 20 L. ed. 702, 703.

[4] Brundige v. Maloney, 52 Iowa, 218.

[5] Nance v. Hopkins, 10 Lea (Tenn.), 508.

[6] Gould v. Day, 94 U. S. 405, 24 L. ed. 232. See, also, Dougherty v. Dickey, 4 Watts & S. 146; Curry v. Hinman, 11 Ill. 420; Wallace v. Brown, 22 Ark. 118, 76 Am. Dec. 421; Walton v. Gray, 29 Iowa, 440; Blight v. Banks, 6 Mon. 206, 17 Am. Dec. 136; Jackson v. Morse, 18 Johns. 441, 9 Am. Dec. 225; Jones v. Gibson, N. C. Term. Rep. 41, 7 Am. Dec. 690.

[7] Hollister v. Sherman, 63 Cal. 38; Hobson v. Dutton, 9 Kan. 477; Sandford v. De Kamp, 8 Watts, 542; Bott v. Perley, 11 Mass. 169; Coney v. Owen, 6 Watts, 435; Buckley v. Osburn, 8 Ohio, 180; Taylor v. Miles, 5 Kan. 498, 7 Am. Rep. 558; Dyer v. Branch Bank of Mobile, 14 Ala. 622; Love v. Wilbourn, 5 Ired. 346; Stewart v. Corbin, 25 Iowa, 144; Penn v. Clemans, 19 Iowa, 372. See, also, Hardy v. Waltham, 7 Pick. 108; Brewster v. Hough, 10 N. H. 138.

[8] Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Kendrick v. Farquhar, 8 Ohio, 197; Bank of Republic v. Hamilton, 21 Ill. 53; Detroit etc. Society v. Mayor, 3 Mich. 182. See, also, Armstrong v. Treasurer of Athens Co., 10 Ohio, 235; Stewart v. Davis, 3 Murph. 244; Biscoe v. Coulter, 18 Ark. 423; Hart v. Plum, 14 Cal. 148; Cincinnati College v. State, 19 Ohio, 110; Howell v. Maryland, 3

§ 1393. **Separate parcels.**—The general rule is that the parcels should be sold as they are given in the list.[9] A sale of a separate and distinct portion of a tract of land, it is held in Maine, cannot be made to pay the taxes assessed upon the whole of it. Either the whole or an undivided fraction of the whole should be sold.[1] Where there are several tracts, each must be sold separately.[2] If a sale is made of "fourteen feet" of a certain lot, the sale is void for uncertainty. The insertion of a proper description in the certificate of purchase or deed will not cure the defect.[3] When an entire tract is assessed, undivided interests, unless authorized by statute, cannot be sold separately.[4] As each parcel of land is chargeable with its own taxes, a sale of separate parcels in one mass is invalid.[5] A tax deed showing the sale

Gill, 14; Hannibal R. R. Co. v. Shacklett, 30 Mo. 550; Seymour v. Hartford, 21 Conn. 481; Anderson v. State, 23 Miss. 459; Chegaray v. Jenkins, 3 Sandf. 409; Portland etc. R. R. Co. v. City of Saco, 60 Me. 196; Platt v. Rice, 10 Watts, 352; Louisville Canal v. Commonwealth, 7 Mon. B. 160; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; People v. Roper, 35 N. Y. 629; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506; Sisters of Charity v. City of Detroit, 9 Mich. 94; Gordon v. The Appeal Tax Court, 3 How. 133, 11 L. ed. 529; Trustees of M. E. Church v. Ellis, 38 Ind. 3; Vail v. Beach, 10 Kan. 214; St. Peter's Church v. County of Scott, 12 Minn. 395.

[9] Shaw v. Kirkwood, 24 Kan. 476; Hayden v. Foster, 13 Pick. 492; Farnham v. Jones, 32 Minn. 7; Kregelo v. Flint, 25 Kan. 695; State v. Sargeant, 76 Mo. 557. See, also, Ware v. Thompson, 29 Iowa, 65; Ballance v. Forsyth, 13 How. 18, 14 L. ed. 32; Willey v. Scoville, 9 Ohio, 43; Martin v. Cole, 38 Iowa, 141; Walker v. Moore, 2 Dill. 256; Spellman v. Curtenius, 12 Ill. 409; Moulton v. Blaisdell, 24 Me. 283; Baskins v. Winston, 24 Miss. 431; Wallingford v. Fiske, 24 Me. 386.

[1] Allen v. Morse, 72 Me. 502.

[2] Morton v. Harris, 9 Watts, 319. See, also, Hayden v. Foster, 13 Pick. 492; Woodburn v. Wireman, 27 Pa. St. 18; Atkins v. Hinman, 2 Gilm. 437.

[3] Roberts v. Chan Tin Pen, 23 Cal. 259.

[4] Roberts v. Chan Tin Pen, 23 Cal. 259; Cragin v. Henry, 40 Iowa, 158.

[5] Woodburn v. Wireman, 27 Pa. St. 18; Andrews v. Senter, 32 Me. 394; Hayden v. Foster, 13 Pick. 492; Matthews v. Buckingham, 22 Kan. 166; Hall v. Dodge, 18 Kan. 277. See, also, Crane v. Randolph, 30 Ark. 584; Bouldin v. Ewart, 63

of several lots in bulk is held not to be void on its face, but the deed is void if it be shown by evidence that the lots are in two separate bodies, separated by a street.[6] It is proper to include in one deed several lots sold separately.[7] The fact that the numbers of the lots are not consecutive does not show that the lots are not contiguous,[8] and a tax deed may include several tracts of land, although they are not contiguous.[9] Nor is a presumption created that the land was sold in gross instead of in separate parcels by the fact that several separate tracts of land were sold to the same person in one deed.[1] Where several tracts adjoin and lie in compact form, and are used and occupied as a single tract, they may be listed together and sold as a single parcel.[2] Tax proceedings are not shown to be illegal by the mere fact that the pleadings show that two contiguous lots owned by the same individual were assessed, taxed and sold together. [3] But a deed will be void where the tracts are in different townships widely separated.[4] If lots are jointly assessed at one valuation for the whole, a separate sale of each by the tax collector is void.[5]

§ 1394. Other requisites.—Whether several lots assessed to one owner and sold in bulk are to be regarded as one lot, it is said, must be determined by the use and nature of the property. Hence, it is decided that if two lots are used

Mo. 330; Pettus v. Wallace, 29 Ark. 476; Howard v. Stevenson, 11 Mo. App. 441.

[6] Cartwright v. McFadden, 24 Kan. 662.

[7] Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112.

[8] Crisman v. Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224.

[9] Barnett v. Jaynes, 26 Colo. 279, 57 Pac. 703.

[1] Bennett v. Darling, 15 S. D. 1, 86 N. W. 751. A deed which attempts to convey several parcels of land not continuous is void: Weeks v. Merkle, 6 Okl. 714, 52 Pac. 929.

[2] Dodge v. Emmons, 34 Kan. 732, 9 Pac. 951.

[3] Pettibone v. Fitzgerald, 62 Neb. 869, 88 N. W. 143.

[4] Emerson v. Shannon, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232.

[5] House v. Gumble, 78 Miss. 259, 29 So. 71.

and occupied for one purpose, with buildings partly on each, they may be sold together.[6] The officer cannot sell the whole of the land, when a sale of the less would pay the tax.[7] If property is sold at one sale for both State and county taxes, combined in a single sum, and the levy of the county taxes is illegal, the sale is void.[8] If the land is sold for a sum exceeding that authorized by law, the sale is void.[9] If the statute requires a report of sale, the provisions of the statute must be complied with.[1] A requirement of the statute that the officer shall sign the return must be observed.[2] If the statute requires the tax sale to be made at the office of the treasurer, a tax deed showing on its face that the sale was

[6] Weaver v. Grant, 39 Iowa, 294. See for other cases on the sale of land in separate parcels or in bulk, McQuesten v. Swope, 12 Kan. 32; Jackson v. Babcock, 16 N. Y. 246; Greer v. Wheeler, 41 Iowa, 85; Farnham v. Jones, 32 Minn. 7; Keely v. Sanders, 99 U. S. 441, 25 L. ed. 327; Springer v. United States, 102 U. S. 586, 26 L. ed. 253; Rankin v. Miller, 43 Iowa, 77; Douthett v. Kettle, 104 Ill. 356; Sheafe v. Wait, 30 Vt. 735; Pennell v. Monroe, 30 Ark. 661; Lawrence v. Miller, 86 Ill. 502; Peirce v. Weare, 41 Iowa, 378; Dietrick v. Mason, 57 Pa. St. 40.

[7] French v. Patterson, 61 Me. 203; Loomis v. Pingree, 43 Me. 299; French v. Edwards, 13 Wall. 506, 20 L. ed. 702; Lovejoy v. Lunt, 48 Me. 377; Straw v. Poor, 74 Me. 53; Whitmore v. Learned, 70 Me. 276; Ainsworth v. Dean, 21 N. H. 400; Stead's Executors v. Course, 4 Cranch, 403, 2 L. ed. 660; Lyford v. Dunn, 32 N. H. 81; Avery v. Rose, 4 Dev. 549; Crowell v. Goodwin, 3 Allen, 535; Jaquith v. Putney, 48 N. H. 138; Mason v. Fearson, 9 How. 248, 13 L. ed. 125.

[8] Hardenburgh v. Kidd, 10 Cal. 402.

[9] Harper v. Rowe, 53 Cal. 233. See, also, McQuilkin v. Doe, 8 Blackf. 581; Young v. Joslin, 13 R. I. 675; Buttrick v. Nashua I. & S. Co., 59 N. H. 392; Hutchens v. Doe, 3 Ind. 528; Dogan v. Griffin, 51 Miss. 782; Treadwell v. Patterson, 51 Cal. 637; Bucknall v. Storey, 36 Cal. 67; Stockle v. Silsbee, 41 Mich. 615; Beard v. Green, 51 Miss. 856; Naltner v. Blake, 56 Ind. 127; McCann v. Merriam, 11 Neb. 241; Genthner v. Lewis, 24 Kan. 309; Shattuck v. Daniel, 52 Miss. 834; Cuming v. Grand Rapids, 46 Mich. 150; Covell v. Young, 11 Neb. 510; Wattles v. Lapeer, 40 Mich. 624; Pack v. Crawford, 29 Ark. 489.

[1] De Quasie v. Harris, 16 W. Va. 345; Barton v. Gilchrist, 19 W. Va. 223. See, also, Burlew v. Quarrier, 16 W. Va. 109.

[2] Taylor v. French, 19 Vt. 49. If the statute requires the officer

made at the office of the county clerk is void.[3] If the sale is made on a day not authorized by the statute, it is void.[4] If the deed shows that several parcels of land were sold in bulk for a gross sum, it is invalid on its face.[5] Under a statute requiring a sale to be made before the courthouse door, the sale will be void if made inside the courthouse.[6]

§ 1395. **The certificate of sale.**—Generally, after the sale has been made, the officer delivers to the purchaser a certificate of sale, and his rights thereunder must be determined from the effect of the language of the statutes of the respective States. In Alabama, until the receipt of the deed, the purchaser has no title.[7] When the certificate is executed by an officer of one State, it should be shown to entitle the certificate to admission in evidence in the courts of another State, that the person whose signature is attached to it was authorized by the laws of the State in which it was made to execute it, and that his signature is genuine.[8] The certificate legally can state only such facts as the statute requires it to state.[9] A strict compliance with the statute in all antecedent steps must be shown by a party claiming a right under a certificate.[1] The certificate is not evidence of any matters which it does not recite.[2] Generally, the right of assignment is recognized.

to record and return to the town treasurer "his particular doings in the sale of unimproved lands of nonresident owners" within a specified time, a failure to comply with the provision invalidates the sale: Shimmin v. Inman, 26 Me. 228.

[3] Crisman v. Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224.

[4] Dougherty v. Crawford, 14 S. C. 628; Ross v. Royal, 77 Ark. 324, 91 S. W. 178; Penrose v. Doherty, 70 Ark. 256, 67 S. W. 398.

[5] Worden & Son v. Cole, 74 Kan. 226, 86 Pac. 464; Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86.

[6] Rubey v. Campbell, 32 Mo. 504.

[7] Johnson v. Smith's Administrator, 70 Ala. 108. And see Annan v. Baker, 49 N. H. 161.

[8] Ward v. Carson River Wood Co., 13 Nev. 44.

[9] Overing v. Foote, 43 N. Y. 290.

[1] Dolph v. Barney, 5 Or. 192.

[2] Hall v. Theisen, 61 Cal. 526.

In Iowa, a purchaser at a tax sale assigned his certificate to another, but the assignment was not recorded. After the expiration of three years from the time of the sale, but before receiving a deed, he executed a quitclaim deed to the owner of the property. The court decided that, the assignment being valid, the quitclaim deed conveyed no title.[3] Where the statute provides that a certificate may be transferred by the purchaser by a written assignment indorsed upon or attached to the certificate, a quitclaim deed cannot be regarded as such an assignment so as to entitle the grantee to a tax deed.[4] The certificate is not a negotiable instrument. The assignee acquires only the rights of the assignor as against one claiming an interest acquired from the assignor before such assignment.[5] The officer has no authority to issue a deed to the assignee of a tax certificate unless the assignment has been made in the mode prescribed by the statute. Where authority to execute a tax deed does not exist, the deed is void, and the original owner of the land has the right to assail the pretended authority which attempts to divest him of his title.[6] By the assignment, the assignee secures the rights and title of the purchaser. The latter cannot divest the assignee of the title by fraudulently procuring the certificate and erasing the assignment, and having the deed executed to himself. He cannot in equity be permitted to keep such a title.[7]

[3] Smith v. Stephenson, 45 Iowa, 645.

[4] State v. Winn, 19 Wis. 304, 88 Am. Dec. 689.

[5] Horn v. Garry, 49 Wis. 464.

[6] Smith v. Todd, 55 Wis. 459.

[7] Bird v. Jones, 37 Ark. 195. For other cases relating to certificates of sale, see Hibbard v. Brown, 51 Ala. 469; Costley v. Allen, 56 Ala. 198; Ferguson v. Miles, 3 Gilm. 358, 44 Am. Dec. 702; Billings v. Stark, 15 Fla. 296; Gardenhire v. Mitchell, 21 Kan. 83; Stout v. Keyes, 2 Doug. (Mich.) 184, 43 Am. Dec. 465; Stephens v. Holmes, 26 Ark. 48; Tilson v. Thompson, 10 Pick. 359; Haseltine v. Simpson, 58 Wis. 579; Billings v. McDermott, 15 Fla. 60; Light v. West, 42 Iowa, 138; Hemmingway v. Drew, 47 Mich. 554; Bryant v. Estabrook, 16 Neb. 217; Otoe County v. Brown, 16 Neb. 394;

§ 1396. **Tax deeds.**—When all the preliminary steps have been complied with, the purchaser or his assignee is entitled, if there has been no redemption, to receive a deed. In some cases the statute requires the service of notice upon the occupant of the property before the purchaser's right to a deed can accrue. The rule is that these statutes must be strictly construed. Thus, in Wisconsin, the statute provided that in certain cases no deed shall be issued, "unless a written notice shall have been served upon the owner, or upon such occupant, by the holder of such certificate, at least three months prior thereto, stating that he is the owner of such certificate, and setting forth the date thereof, and giving notice that after the expiration of three months from the service thereof, such deed will be applied for." The statute required the filing of an affidavit showing such service, and specifying particularly the time and manner of service. A notice was given which stated that the purchaser was the "holder" of the certificate, but which failed to state that he was the "owner" of it. The court held that the omission rendered the notice insufficient.[8] The affidavit of service must follow the requirements of the statute, and state the facts constituting the service, so that the court may determine that the mode of service is in compliance with law.[9]

Donohoe v. Veal, 19 Mo. 331; Sanborn v. Cooper, 31 Minn. 307; McCauslin v. McGuire, 14 Kan. 234; Manseau v. Edwards, 53 Wis. 457; Potts v. Cooley, 56 Wis. 45; Hightower v. Freedle, 5 Sneed, 312; Smith v. Janesville, 52 Wis. 680; Hyde v. Kenosha County, 43 Wis. 129; Barton v. McWhitney, 85 Ind. 481; Davis v. Powell, 13 Ohio, 320; Stebbins v. Guthrie, 4 Kan. 353; Lee v. Breezly, 54 Iowa, 660; Gage v. Bailey, 102 Ill. 11.

[8] Potts v. Cooley, 51 Wis. 353. "Both words appear in the statute," said the court, "and in such a way as to indicate a different intent in the use of the one than in the use of the other. It is to be remembered that tax titles being under a mere naked power, are *stricti juris*. . . . In the case here presented, the statute absolutely prohibits the issuing of the tax deed, except upon the service of the requisite notice. We have no disposition to question the wisdom of the statute, or attempt to do away with its provisions by construction."

[9] Price v. England, 109 Ill. 394.

The deed itself is not conclusive evidence of the giving of proper notice of the expiration for the time of redemption.[1] If the notice and proof of service are regular on their face, and a deed is executed accordingly, a person who attacks the validity of the deed on the ground that notice was not served as shown by the proof, or that it was not served upon the proper persons, has the burden of proof to overcome the *prima facie* evidence which the papers supply.[2] Until the execution and delivery of a deed a purchaser does not possess even a *prima facie* right to the land which he has bought.[3] The purchaser's right to receive a deed under the laws of the state is not affected by the fact that the land sold is in the possession of a receiver of a federal court as part of the assets of an insolvent corporation.[4] The law in force at the time of the sale must determine the validity of a tax deed, and when valid under such law subsequent legislation cannot affect it.[5] Where the statute authorizes the issuance of a tax deed to the purchaser, "his heirs and assigns," his executors are his assigns within the meaning of the statute.[6] The law of the place in which the property is located governs the validity and effect of the deed.[7] A purchaser has an equitable title

[1] Reed v. Thompson, 56 Iowa, 455; Wilson v. Crafts, 56 Iowa, 450.

[2] Wilson v. Crafts, 56 Iowa, 450. For other cases relating to notices to be served before issuance of deed, see Gage v. Schmidt, 104 Ill. 106; Le Blanc v. Blodgett, 34 La. Ann. 107; Blackistone v. Sherwood, 31 Kan. 35; Heaton v. Knight, 63 Iowa, 686; Denike v. Rourke, 3 Biss. 39; Long v. Smith, 62 Iowa, 329.

[3] Spaulding v. Ellsworth, 39 Fla. 76, 21 So. 812; Burgin v. Rutherford, 56 N. J. Eq. 666, 38 Atl. 804; Kaighn v. Burgin, 56 N. J. Eq. 852, 42 Atl. 1117; Betts v. Dick, 1 Pennewill, 268, 40 Atl. 185.

[4] Rice v. Jerome, 97 Fed. 719, 38 C. C. A. 388; Whitehead v. Farmers' Loan & Trust Co., 98 Fed. 10, 29 C. C. A. 34; But see Johnson v. Southern etc. Assn., 132 Fed. 540.

[5] Sheafer v. Mitchell, 109 Tenn. 181, 71 S. W. 86; Snider v. Smith, 75 Ark. 306, 87 S. W. 624; Fitzgerald v. Sioux City, 125 Iowa, 396, 101 N. W. 268; Sapp v. Morrill, 8 Kan. 677; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

[6] Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 106 N. W. 566, 125 Am. St. Rep. 574.

[7] Wines v. Woods, 109 Ind. 291, 10 N. E. 399.

where the sale has been confirmed which will be strong enough to defeat ejectment against him.[8] A tax deed issued after a redemption is void.[9] And so is a tax deed without a valid sale and decree.[1]

§ 1397. **Preliminary requirements.**—All the preliminary requirements essential in a tax proceeding should be complied with. A failure to do so affects the validity of the deed. Thus, for instance, a tax deed is void where it appears that the assessor, in assessing a lot owned and occupied as a single lot, arbitrarily divided it into two parts, and assessed one part to the owner and the other part to unknown owners, as such assessment to unknown owners is illegal.[2] Authority to execute a tax deed must be conferred by statute, or the deed is void.[3] A deed may be executed, although the person to whom the land is assessed has since died.[4] If, before the issuance of the tax deed, the land has been redeemed, the deed is void.[5]

§ 1398. **Purchaser's right to deed.**—The purchaser has a right to receive a deed when the time provided for redemption has expired, although persons under disabilities have additional time in which to make a redemption.[6] An

[8] Gavin v. Ashworth, 77 Ark. 242, 91 S. W. 303.

[9] Letzbach v. Jackman, 28 Kan. 524.

[1] Citizens' Sav. Bank v. Auditor General, 120 Mich. 505, 79 N. W. 979.

[2] Bidleman v. Brooks, 28 Cal. 72. An irregularity of this kind, as we have seen, destroys the *prima facie* evidence of the deed. See § 1384, *ante*.

[3] Smith v. Todd, 55 Wis. 459; Sprague v. Coenen, 30 Wis. 209; Knox v. Peterson, 21 Wis. 247; Lathrop v. Brittain, 30 Cal. 680. As to the validity of a deed executed by a sheriff as tax collector by his under sheriff, see Lathrop v. Brittain, 30 Cal. 680.

[4] Currey v. Fowler, 3 Marsh. A. K. 504.

[5] Matthews v. Buckingham, 22 Kan. 166; Leitzbach v. Jackman, 28 Kan. 524.

[6] Wright v. Wing, 18 Wis. 45. For cases upon the various requirements preceding the execution of the deed, see Keene v. Houghton, 19 Me. 368; State v. Richard-

officer can be compelled by *mandamus* to execute a proper deed when the one made by him is not in compliance with law.[7] The validity of a tax deed depends upon a lawful assessment.[8] A deed given on the sale of property exempt from taxation is void on its face.[9] If property is sold for both State and county taxes together, the entire sale, if the county taxes are illegally levied, is void.[1] The full period for redemption must have expired and a deed executed and delivered on the last day for redemption is void.[2] Nor is such a deed made valid when the period for redemption has expired.[3] But although the deed may be dated before the expiration of the time for redemption, yet if it appears by

son, 21 Mo. 420; Ide v. Finneran, 29 Kan. 569; Walton v. Gale, 9 Gratt. 194; Potts v. Cooley, 51 Wis. 353; Terrell v. Grimmell, 20 Iowa, 393; Gage v. Schmidt, 104 Ill. 106; Mead v. Nelson, 52 Wis. 402; Miller v. Williams, 15 Gratt. 213; Jones v. Dills, 18 W. Va. 764; Hobbs v. Shumates, 11 Gratt. 516; Ockendon v. Barnes, 43 Iowa, 615; Swope v. Saine, 1 Dill. 416; McCauslin v. McGuire, 14 Kan. 238; Eaton v. North, 32 Wis. 303; Forqueran v. Donnally, 7 W. Va. 114; Maumas v. Bennett, 31 La. Ann. 642; Scheftels v. Tabert, 46 Wis. 440; Davis v. Jackson, 14 W. Va. 227; Howe v. Genin, 57 Wis. 268; Dreutzer v. Smith, 56 Wis. 292; Potts v. Cooley, 51 Wis. 353; Cooper v. Bushley, 72 Pa. St. 252; Griswold v. Wilson, 36 Iowa, 156; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Covel v. Young, 11 Neb. 510.

[7] Hewell v. Lane, 53 Cal. 213; Grimm v. O'Connell, 54 Cal. 523.

[8] Braly v. Seaman, 30 Cal. 610. See, generally, the late cases. Keefe v. Bramhall, 3 Mackey (D. C.), 551; McTigue, 22 Fed. Rep. 148; McCallister v. Cottrille, 24 W. Va. 173; Miller v. McCullough, 104 Pa. St. 624; Walker v. Taylor, 43 Ark. 543; Wright v. Zettel, 60 Wis. 168; Irvin v. Smith, 60 Wis. 175; Parker v. Cochran, 64 Iowa, 757; Watt v. Donnell, 80 Mo. 198; Lowe v. Ekey, 82 Mo. 286; Spurlock v. Dougherty, 81 Mo. 171; Doster v. Sterling, 33 Kan. 381; Walker v. Boh, 32 Kan. 354; Ludden v. Hansen, 17 Neb. 354; Connolly, 63 Iowa, 202. A tax sale is void when made for an amount in excess of that authorized by law: Axtell v. Gerlach, 67 Cal. 483. See, also, Boston Tunnel Co. v. McKenzie, 67 Cal. 485.

[9] Hollister v. Sherman, 63 Cal. 38.

[1] Hardenburgh v. Kidd, 10 Cal. 402.

[2] Brinker v. Union Pac. Ry. etc. Co., 11 Colo. App. 166, 55 Pac. 207.

[3] Griffin v. Jackson, 145 Mich. 23, 108 N. W. 438.

evidence *aliunde* that it was not delivered until after the expiration of that period, it is valid.[4]

§ 1399. **What the deed should contain.**—A tax deed should contain the same requisites as other deeds, and such additional matters as may be necessary. When a statutory form is prescribed there must be at least a substantial compliance with it.[5] Where the statute does not provide for certain recitals in a tax deed, such recitals are mere surplusage, and do not affect the validity of the deed.[6] But if the statute requires that the deed shall recite the year for which the taxes were due, a misrecital in the year renders the deed void.[7]

[4] David v. Whitehead, 13 Wyo. 189, 79 Pac. 19, 923.

[5] Hubbell v. Campbell, 56 Cal. 532; Grimm v. O'Connell, 54 Cal. 522; Hobson v. Dutton, 9 Kan. 477; Boardman v. Bourne, 20 Iowa, 134; Magill v. Martin, 14 Kan. 81; Falkner v. Dorman, 7 Wis. 386; Atkins v. Kinnan, 20 Wend. 249; Marshall v. Benson, 48 Wis. 558; Haynes v. Heller, 12 Kan. 381; Bowman v. Cockerill, 6 Kan. 311; Chandler v. Spear, 22 Vt. 388; Smith v. Hileman, 1 Scam. 323; Kinney v. Beverley, 2 Hen. & M. 531; Krueger v. Knab, 20 Wis. 429; North v. Wendell, 22 Wis. 431; Pearce v. Tittsworth, 87 Mo. 635; Hopkins v. Scott, 86 Mo. 140; Williams v. McLenahan, 67 Mo. 499. As to recitals under the statute of Massachusetts, see Langdon v. Stewart, 142 Mass. 576.

[6] Harper v. Rowe, 55 Cal. 132.

[7] Maxcy v. Clabaugh, 1 Gilm. 26. And see, also, Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189. Where the deed omits to recite or recites erroneously the facts required by law to be recited, it, as a general proposition, is invalid: Doe v. Hileman, 2 Ill. 323; Bender v. Dugan, 99 Mo. 126; Duff v. Neilson, 90 Mo. 93; Moore v. Harris, 91 Mo. 621; Spurlock v. Allen, 49 Mo. 178; Harrington v. Worcester, 6 Allen, 576; Lawrence v. Zimpleman, 37 Ark. 693; McEntire v. Brown, 28 Ind. 347; Wakeley v. Mohr, 18 Wis. 136; McDermott v. Scully, 27 Ark. 226; Wambole v. Foote, 2 Dak. 1. See, also, as to omissions of recitals, Abbott v. Doling, 49 Mo. 302; Wiggin v. Temple, 73 Me. 382; Moore v. Harris, 91 Mo. 616; Baldwin v. Merriam, 16 Neb. 199; Haller v. Blaco, 10 Neb. 36; Towle v. Holt, 14 Neb. 221; Howard v. Lamaster, 11 Neb. 582; Mason v. Crowder, 85 Mo. 526; Haynes v. Heller, 12 Kan. 381; Ladd v. Dickey, 84 Me. 190.

§ 1400. **Date, seal, etc.**—In the absence of evidence, a deed will be presumed to have been made at the proper time when not dated.[8] A tax deed which literally follows the form by the statute is good, although it may not show for what year the taxes were levied.[9] The general rule is that the deed must be sealed.[1] There must be evidence of an assignment when a certificate of sale is made to one person and the deed to another.[2] A certificate showing that property was assessed to a person, and to "all claimants known and unknown," shows an invalid assessment, and may be introduced in evidence to defeat a deed founded upon it, notwithstanding that the deed may be regular on its face.[3] A deed containing such a recital on its face is void.[4]

§ 1401. **Recitals.**—The deed should recite the power by which it is executed, and that the execution occured at the time and place prescribed by law.[5] A tax deed is invalid if it does not contain a recital of an offer at public sale on the day fixed, or does not state an adjournment.[6] If an order of court for the sale of land at a specified time is required by statute, the absence of a recital that the sale was had in pursuance of an order of court, renders the deed in-

[8] Thompson v. Schuyler, 2 Gilm. 271.

[9] Marshall v. Benson, 48 Wis. 558. And see Bell v. Gordon, 55 Miss. 45; Bonnell v. Roane, 20 Ark. 126.

[1] Doty v. Beasley, 2 Bibb, 14; Blackwell on Tax Titles, 366; Sullivan v. Merriam, 16 Neb. 157; Seaman v. Thompson, 16 Neb. 546; Baldwin v. Merriam, 16 Neb. 199; Shelley v. Towle, 16 Neb. 194.

[2] Florida Savings Bank v. Brittain, 20 Fla. 507; McMinn v. Whelan, 27 Cal. 200.

[3] Daly v. Ah Goon, 64 Cal. 512; Hall v. Theisen, 61 Cal. 524. See Hearst v. Egglestone, 55 Cal. 365.

[4] Brady v. Dowden, 59 Cal. 51.

[5] Tolman v. Emerson, 4 Pick. 160; Jackson v. Roberts, 11 Wend. 425; Thompson v. Lawrence, 2 Baxt. 415; Ferris v. Coover, 10 Cal. 589; Spurlock v. Dougherty, 81 Mo. 171.

[6] Williams v. Kirkland, 13 Wall. 309, 20 L. ed. 684; Wambole v. Foote, 2 Dakota, 1; French v. Edwards, 13 Wall. 506, 20 L. ed. 702.

valid.[7] A deed reciting that it was made on a day which could not have been the time for which the statute required the sale to be advertised, is not, under the Missouri statute, void on its face. The statute requires only a recital of the day on which the land was offered for sale, and while the statute provides for adjourned sales, the form of deed prescribed by statute does not require the fact of adjournment of sales from day to day to be recited.[8] But if the recitals in a tax deed affirmatively show the rendition of no judgment against the land sold for taxes, the deed is void.[9] If the statute prescribes a form containing certain recitals although the recitals need not be made in the language used in the form, yet they must be substantially made. An omission to do so renders the deed invalid.[1] For instance, where the statute prescribes a form containing a recital, "that the city collector did expose to public sale the real property described, for the payment of taxes, interest, and costs, then due and unpaid upon said property," the omission of the latter clause, "for the payment of taxes," etc., although the deed may contain every other recital, is a fatal defect. The argument was made that if the omitted recital be inferred from other portions of the deed, its omission ought to be considered immaterial. The court said: "We concede that this inference can be drawn, but it does not, therefore, follow that when the legislature has required a fact to be substantially affirmed, which is not thus affirmed, that from other facts which it also requires to be substantially affirmed, and which are affirmed, and which neither perform the same office as the omitted fact, nor necessarily include it, we can infer the omitted fact, and substitute by inference what the law-making power has said must be affirmed. The office of the recital that the collector exposed the lots in question to sale "for the

[7] McDermott v. Scully, 27 Ark. 226.

[8] Hill v. Atterbury, 88 Mo. 114.

[9] Cuffey v. O'Reiley, 88 Mo. 418.

[1] Hopkins v. Scott, 86 Mo. 140.

payment of taxes, interest, and costs, then due and unpaid,' was to show that he exposed it to sale for the only purpose for which, under the law, he could sell it. The office of the other recitals was to show that it was in fact sold for the very purpose for which it had been offered for sale, and that the proceeds of the sale were applied to that purpose. It may be said that to hold the deed in question to be void on its face, because of its failure to state substantially a fact required to be thus stated, would be technical. The answer to this is, that the legislature has required a certain fact to be substantially stated, which in this case has not been done, and we are not authorized to eliminate from the statute a recital which the legislature has declared the deed must substantially contain, nor are we authorized to say that this or that recital required to be stated substantially in a tax deed is unnecessary and immaterial, but must, on the contrary, presume that the legislature deemed all the recitals which it required to be set out material." [2]

§ 1402. **Statement of facts.**—The several statutes generally require that the tax deed shall contain a statement of certain facts, the existence or performance of which is essential to the validity of the deed. These facts must be stated as facts—in such a manner that the court can see from the deed itself that the officer has complied with the statute. His conclusions as to what he deems a proper compliance with the statute amounts to nothing. Therefore, as we have previously noticed, a deed is not valid if it contains no other recital as to notice than that the lands conveyed "were advertised according to law." [3]

[2] Hopkins v. Scott, 86 Mo. 140, 146, per Norton, J.

[3] See § 1358, *ante*. Large v. Fisher, 49 Mo. 307; Yankee v. Thompson, 51 Mo. 238; Abbott v. Doling, 49 Mo. 302; Spurlock v. Allen, 49 Mo. 178.

§ 1403. **Form of conveyance.**—When the statute authorizes the execution of a deed without requiring a particular form, a deed in the form of a common-law conveyance, and reciting the power under which it was made, is sufficient, when accompanied by proof that there has been a strict compliance with the law.[4] But where the statute prescribes a particular form, that form, as we have before remarked, must be followed.[5] The deed should recite that it became necessary to sell the whole of the land to pay the taxes and charges, and that no person would pay the same for a smaller quantity of the land.[6] And in general, the deed should contain sufficient recitals to show the authority for the sale.[7]

[4] Brown v. Hutchinson, 11 Vt. 569; Chandler v. Spear, 22 Vt. 388; Spear v. Ditty, 8 Vt. 419.

[5] See for authorities, § 1399, n. 1.

[6] Lovejoy v. Lunt, 48 Me. 377; Briggs v. Johnson, 71 Me. 236; Loomis v. Pingree, 43 Me. 311; French v. Patterson, 61 Me. 203. Where the statute prescribes a particular form, it is held in many cases that the statute is mandatory: Wellshear v. Kelley, 69 Mo. 353; Hopkins v. Scott, 86 Mo. 140; Williams v. McLenahan, 67 Mo. 499; Grimm v. O'Connell, 54 Cal. 522; Hubbel v. Campbell, 56 Cal. 527. In other cases this strictness of construction is not followed, and it is held that a substantial compliance with the statute is all that is necessary: Haynes v. Heller, 12 Kan. 381; McQuesten v. Swope, 12 Kan. 32; Martin v. Garrett, 49 Kan. 131; Bowman v. Cockrill, 6 Kan. 311; Mack v. Price, 35 Kan. 134; McCauslin v. McGuire, 14 Kan. 248; Heller v. Blaco, 10 Neb. 38; Sutton v. Stone, 4 Neb. 319; Doe v. Hileman, 2 Hen. & M. 318; Gabe v. Root, 93 Ind. 256.

[7] Sibley v. Smith, 2 Mich. 486; Wetherbee v. Dunn, 32 Cal. 106; Large v. Fisher, 49 Mo. 307; Madland v. Benland, 24 Minn. 372; Elston v. Kennicott, 46 Ill. 187; Woodward v. Sloan, 27 Ohio St. 592; Little v. Herndon, 10 Wall. 26, 19 L. ed. 878. For other cases as to the necessity of certain recitals in tax deeds under particular statutes, and the sufficiency of such recitals, see Frentz v. Klotsch, 28 Wis. 312; Pleasants v. Scott, 21 Ark. 370, 76 Am. Dec. 403; Lain v. Cook, 15 Wis. 446; Miller v. Hurford, 11 Neb. 384; Towle v. Holt, 14 Neb. 227; Sutton v. Stone, 4 Neb. 321; Mulcahey v. Florer, 27 Minn. 449; Lunenburg v. Heywood Chair Co., 118 Mass. 540; Hickman v. Kempner, 35 Ark. 505; Haller v. Blaco, 10 Neb. 38; McDermott v. Scully, 27 Ark. 226; Clarke v. Rowan, 53 Ala. 401; Huey v. Van Wie, 23 Wis. 613;

§ 1404. **Reference to statutory provisions.**—A tax deed failing to contain the recital in the certificate of sale with reference to the time when the purchaser would be entitled to a deed, is fatally defective.[8] Where a certain article of a city charter provides that when property is sold for a street assessment, a deed shall be made to the purchaser, "stating therein that it is made subject to redemption as provided in this article," and provides further that the deed "must express the true consideration thereof which is the amount paid by the purchaser," a deed stating that it is made subject to redemption as provided in another article of the charter, and failing to state the true consideration, is void.[9] If a tax deed is void, it cannot be made valid by proving a valid assessment.[1] A provision of the Massachusetts statute was that "taxes assessed on real estate may, with all incidental costs and expenses, be levied by sale thereof if the tax is not paid within fourteen days after demand of

Stockle v. Silsbee, 41 Mich. 615; White v. Flynn, 23 Ind. 646; Gavin v. Shuman, 23 Ind. 32; Philleo v. Hiles, 42 Wis. 527; Oconto Co. v. Jerrard, 46 Wis. 324; Perkins' Lessee v. Dibble, 10 Ohio, 433, 36 Am. Dec. 97; Brigins v. Chandler, 60 Miss. 862; Spain v. Johnson, 31 Ark. 314; Hogins v. Brashears, 13 Ark. 242; Reed v. Crapo, 127 Mass. 40; Wakeley v. Mohr, 18 Wis. 321; Woodward v. Sloan, 27 Ohio St. 592; Woodward v. O'Shaughnessy, 3 Lea, 724; Brown v. Walker, 11 Mo. App. 226; Bowman v. Cockrill, 6 Kan. 325; State v. Patterson, 11 Neb. 266; Morrill v. Douglas, 14 Kan. 302; Ferris v. Coover, 10 Cal. 589; O'Grady v. Barnishell, 23 Cal. 287; Wetherbee v Dunn, 32 Cal. 106; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Bidleman v. Brooks, 28 Cal. 72. See as to void deeds, People v. Hastings, 29 Cal. 449; Hurlbutt v. Butenop, 27 Cal. 50. See, also, Burr v. Hunt, 18 Cal. 303; Kelsey v. Abbott, 13 Cal. 609.

[8] Anderson v. Hancock, 64 Cal. 455. And see Grimm v. O'Connell, 54 Cal. 522; Hubbell v. Campbell, 56 Cal. 527.

[9] Hubbell v. Campbell, 56 Cal. 527.

[1] Hearst v. Egglestone, 55 Cal. 365. See, also, Grimm v. O'Connell, 54 Cal. 522. The facts must be stated, and not a conclusion drawn from the facts: Ladd v. Dickey, 84 Me. 190; Spurlock v. Allen, 49 Mo. 178; May v. Wright, 17 Vt. 97, 42 Am. Dec. 481; Large v. Fisher, 49 Mo. 307; Duncan v. Gillette, 37 Kan. 156.

payment, made either upon the person taxed or upon any person occupying the estate." The statute also required that the officer's deed "shall state the cause of sale," as well as the steps preparatory to the sale. A deed stated a demand of the tax made on the person taxed, but failed to state that payment was not made within fourteen days. The court considered that this was not a statement of a legal cause of sale, and that the defect prevented the passing of the title, such statement being a condition precedent to the operation of the deed.[2] "If the legal cause of the sale may be omitted in the deed," said Mr. Justice Metcalf, "and the defect be supplied by proof *aliunde,* or by admission, so may any or all of the other matters which the statute requires that the deed shall state. The collector has a mere naked power to sell real estate for nonpayment of taxes thereon, and to convey a title thereto to the purchaser; and, in such a case, the law requires that all the prerequisites to the exercise of that power must precede its exercise. Among those prerequisites to the conveyance of the estate sold is the statement in the deed of conveyance of the cause of sale. Unless a legal cause of sale is therein stated, the attempted conveyance is invalid." [3] That the sale was made at the place fixed by statute should be stated.[4]

§ 1405. **Description of land.**—Greater strictness is required of the description of the land contained in a tax deed than in voluntary deeds. The land must be described with such accuracy that with ordinary and reasonable certainty the land sold can be ascertained and identified.[5] A tax deed is

[2] Harrington v. City of Worcester, 6 Allen, 576.

[3] Harrington v. City of Worcester, 6 Allen, 576, 578.

[4] Shelley v. Towle, 16 Neb. 194; Baldwin v. Merriam, 16 Neb. 199. As to recitals when land is offered at private sale, see Ludden v. Hansen, 17 Neb. 354.

[5] Larrabee v. Hodgkins, 58 Me. 412; Bingham v. Smith, 64 Me. 450; Wilkins v. Tourtellott, 28 Kan. 825, 848; Winkler v. Higgins, 9 Ohio St. 599; Ronkendorf v.

void for uncertainty in which the land is described as "lot **3,** and the northeast quarter of the northwest quarter *less seven acres* (lot 3, and N. E. ¼ of N. W. ¼ less seven acres) of section five (5), township forty-eight (48), range four (4) west." [6]

§ 1406. **Illustrations.**—So is a deed void for uncertainty in description, in which the description is "two hundred acres in section 2, T. 12, range 1 east."[7] So is a deed describing the land as "thirty-four acres of the southeast quarter of the southeast quarter of section two, in township twenty-four north, of range five west, third principal meridian."[8] So is a deed describing the land as "forty feet of lot No. 2, in block No. 2, Davenport." [9] If, subsequently

Taylor, 4 Peters, 349; Orton v. Noonan, 23 Wis. 102; Griffin v. Creppin, 60 Me. 270.

[6] Johnson v. Ashland Lumber Co., 52 Wis. 458. Said the court: "It is very clear from this description that there were seven acres, a part of this tract, which were not intended to be conveyed by said deed, and were not conveyed by it; and as such seven acres were in no way described, it is quite impossible to determine from the deed itself what lands are conveyed by it. The deed, in fact, purports to convey all of lot 3, and the N. E. ¼ of the N. W. ¼ of section 5, etc., but seven acres. Suppose the two tracts contain in all seventy-seven acres, then the deed conveys seventy acres of lot 3, and the N. E. ¼ of N. W. ¼ of section 5. What seventy acres are conveyed? It is quite impossible to tell from the deed itself, and there is no way to make the description certain by any reference in the deed to objects on the land, or adjoining it, which would make it certain. From the data given by the deed, it is impossible to locate the lands conveyed. We think the deed must be held void on account of the uncertainty of the description. The following cases upon the question of description in tax deeds, we think, fully sustain these views: Head v. James, 13 Wis. 641; Curtis v. Supervisors, 22 Wis. 167; Greene v. Lunt, 58 Me. 518; Inhabitants of Orono v. Veazie, 61 Me. 431; Lessee of Massie's Heirs v. Long, 2 Ohio, 287, 15 Am. Dec. 547; Treon's Lessee v. Emerick, 6 Ohio, 391; Stewart v. Aten, 5 Ohio St. 257; Bidwell v. Coleman, 11 Minn. 78."

[7] Yandell v. Pugh, 53 Miss. 296.

[8] Schackleford v. Bailey, 35 Ill. 387.

[9] Bosworth v. Farenholz, 3 Iowa, 84. And see, also, Keane v. Can-

to the sale, there has been a change in the name of the streets, a description is sufficient which would have been correct at the time of the sale.[1] A tax deed is not necessarily void because a false call has been inserted in the description of the land. The assessment or deed is not void on account of a mistake in the description, unless it is so great that it might probably mislead the owner, and prevent him from ascertaining that his land had been assessed.[2] A description as the "east part of the southeast quarter of section 30, 5 N., 4 E., containing 60 30/100," is too uncertain to enable a deed to pass the title.[3] So a description of the land as "the east side except the southeast corner of the northwest quarter of section 31, Twp. 24 N., R. 42, 4th P. M." renders the deed void, as it is impossible to locate the excepted portion.[4] No title will pass by a deed describing the land as "a part of the west ½ of the southeast ¼ of section 21, township 25 north, 3 west, containing 4 acres."[5] Nor will title pass where the property is described as "a lot of land containing five acres or thereabouts, situated on the westerly side of B street, at Camden village, within the town of Camden aforesaid, on Ogiers Point, so called."[6]

novan, 21 Cal. 291, 82 Am. Dec. 738; Garwood v. Hastings, 38 Cal. 224; Blair Land Co. v. Scott, 44 Iowa, 147; Sutton v. Calhoun, 14 La. Ann. 209; Jacks v. Chaffin, 34 Ark. 534; Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61; Ballance v. Forsyth, 13 How. 18, 14 L. ed 32; Tripp v. Ide, 3 R. I. 51; Green v. Craft, 28 Miss. 70; Poindexter v. Doolittle, 54 Iowa, 52; Flannagan v. Boggess, 46 Tex. 331; Raymond v. Longworth, 14 How. 76, 14 L. ed. 333; Quinby v. North American Coal Co., 2 Heisk. 596; Lafferty v. Byers, 5 Ohio, 458; Harvey v. Mitchell, 31 N. H. 575; Bruce v. McBee, 23 Kan. 379; Case v. Albee, 28 Iowa, 277; Hill v. Mowry, 6 Gray, 551.

[1] Pursell v. Porter, 20 La. Ann. 323.

[2] Bosworth v. Danzien, 25 Cal. 296.

[3] Covington v. Berry, 76 Ark. 460, 88 S. W. 1005.

[4] Alleman v. Hammond, 209 Ill. 70, 70 N. E. 661.

[5] Armstrong v. Hufty, 156 Ind. 606, 55 N. E. 443.

[6] Green v. Alden, 92 Me. 177, 42 Atl. 358.

§ 1407. **Same subject, continued.**—Where the land is described as "Commencement Plantation, consisting of 1,330 acres," and the names of the State and county are given, the deed is not void for uncertainty in description.[7] A tax deed in which the description was, "the west half of the northwest quarter, and the grist and saw mills, except therefrom five acres, being west of Cedar creek, in section ten, town. ten north, of range twenty-one east, containing seventy-five acres." was held not to be void for uncertainty, but to be good for all the land lying west of Cedar creek, the only uncertainty, if any, relating to the exception.[8] A tax deed is not void for uncertainty of description which describes the land conveyed as "Block No. 25, less a lot belonging to Bryant, 70 by 137½, in the southeasterly corner." [9] But a descripton of land in a certain county, omitting the town, is fatally defective.[1] If the description at the time of the sale is so general as to be void for uncertainty, the insertion of a proper description in the certificate of purchase or deed will not cure the defect.[2] A description of the land as "one-fourth, No. 5, R. 8, W. E. L. S.," renders the deed void on account of the vagueness of the description.[3] A tax deed is invalid in which the premises are described as "land east corner of Congress and Exchange streets, extending through to Market." [4] A description of the land as "L. B. R. W. Pt. southeast quarter of section 30, township 5 north, range 4 east,"

[7] Vaughan v. Swayzie, 56 Miss. 705; Anderson v. Hancock, 61 Cal. 88. And see, generally, Tallman v. White, 2 N. Y. 66; McCready v. Lansdale, 58 Miss. 877; Johnstone v. Scott, 11 Mich. 232; Winkley v. Kaime, 32 N. H. 268; Crooks v. Whitford, 47 Mich. 283; Ives v. Campbell, 1 Mich. 308; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; Brunn v. Murphy, 29 Cal. 326; Selden v. Coffee, 55 Miss. 41; Martz v. Newton, 29 Kan. 331.

[8] Scheiber v. Kaehler, 49 Wis. 291.

[9] Wetherbee v. Dunn, 32 Cal. 106.

[1] Campbell v. Packard, 61 Wis. 88.

[2] Roberts v. Chan Tin Pen, 23 Cal. 259.

[3] Larrabee v. Hodgkins, 58 Me. 412.

[4] Bingham v. Smith, 64 Me. 450.

is so uncertain as to render the deed void.[5] A mistake in the number of acres will not invalidate a deed if the land is otherwise properly designated and described.[6] Where in a tract there are many lots numbered 18 and 19, a tax deed which describes the land as "lots 18 and 19 in block C," is insufficient.[7] A tax deed is void for uncertainty which describes the land as "37 acres in the north half of section one" in a certain township.[8] A description is imperfect which describes the land as certain lands assessed in the name of R., containing 640 acres, boundaries unknown."[9] The abbreviation "S. E. 4" will be interpreted as signifying as southeast quarter when employed in other parts of the deed as meaning such.[1] A deed is void for uncertainty in which the land is described as "twenty-five acres north side, fronting on highway" of a tract of land "to be located and laid out at the expense of the grantee," but which fails to give any boundaries and any indication from which portion of the north side the land is to be taken.[2] Where the deed correctly described the land in the commencement and in subsequent recitals the first description is plainly referred to without redescribing the land, the deed is not void for indefiniteness of description.[3] It is not important that the letter "s" is omitted from the word "tracts" in the recital of the sale of several tracts of land.[4]

§ 1408. **Strictness of law as to description.**—The rule governing descriptions in tax deeds is thus stated by Mr. Justice Ruggles: "In a deed between individuals, a part of

[5] Rhodes v. Covington, 69 Ark. 357, 63 S. W. 799.

[6] Towell v. Etter, 69 Ark. 34, 63 S. W. 53.

[7] Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

[8] Nelson v. Abernethy, 74 Miss. 164, 21 So. 150.

[9] Cooper v. Falk, 109 La. 474, 33 So. 567.

[1] Kennedy v. Scott, 72 Kan. 359, 83 Pac. 971.

[2] Underhill v. Keirns, 170 N. Y. 587, 63 N. E. 1122.

[3] Ham v. Booth, 72 Kan. 429, 83 Pac. 24.

[4] Coombs v. Crabtree, 105 Mo. 292, 16 S. W. 830.

the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. In this case, if the owner of the land had executed the deed, giving the boundaries correctly, the title might have passed, although the land was falsely described as to the village in which it lay. It would then present the question what the owner intended to convey. There is no such question here. The owner conveys nothing, and does not intend to convey anything. If the officers who undertake to convey for him intend to convey lands lying in one place by a deed describing them as lying in a different place, they intend to do what the statute, under which they profess to act, does not permit. A judicial decision which should sanction a title like the present would open a door to innumerable frauds." [5] In the case just cited, the land was described as lying in the village of Lodi, when it lay, in fact, elsewhere. The tract in which it was situated was known as the village of Syracuse, known as a different place from Lodi, although both were in the same town. In another case, the name of a village, according to the recorded plat, was Wisconsin City. A tax deed described the land as 'lot 7, block 17, on the survey plat of Washington City, now called Port Washington." On proof that the place was familiarly known and recognized by citizens and conveyancers as Washington City, or Port Washington, the Court held that the description was sufficient.[6] But a description of the land as "ten acres in lot number 26, in the eleventh range, in the town of Columbia," renders the deed void for uncertainty.[7]

§ 1409. **Execution of deed.**—The real date of the deed is the time at which it is delivered.[8] It is not essential to

[5] In Tallman v. White, 2 Const. 66, 72.

[6] Mecklem v. Blake, 19 Wis. 397.

[7] Harvey v. Mitchell, 31 N. H. (11 Fost.) 575.

[8] Jackson v. Schoonmaker, 2

the validity of the deed that it should be acknowledged. Its execution may be otherwise proved.[9] Unless a seal is attached, the deed is held to be inadmissible in evidence.[1] But if there is no method prescribed by statute in which the deed is to be sealed, the officers may use their private seals.[2] But where a seal is required by statute, a scroll is not sufficient.[3] When tax deeds are required to be acknowledged before the county clerk, they are void if acknowledged before a notary public.[4] It is not necessary that the date of the delivery should be stated in the acknowledgment.[5]

§ 1410. **Same subject—Other particulars.**—As in the case of voluntary deeds, delivery of a deed regularly executed will be presumed from its possession.[6] And it would seem that where a tax deed is acknowledged, it is sufficient without witnesses.[7] Where the deed is required to be made by the tax collector, the fact that the deed is signed by him as *sheriff and* tax collector," does not render the deed void.[8] Under a Massachusetts statute, no title, it was held, could be claimed under a tax deed, unless the deed had been acknowledged and recorded.[9] A tax deed which recites that the sale was begun and publicly held on the first Monday of December, instead of the first Monday in October, as provided by the Iowa statute, is not void on the ground that the deed shows

Johns. 234; McMichael v. Carlyle, 53 Wis. 504.

[9] Dalton v. Fenn, 40 Mo. 109; Hogins v. Brashears, 13 Ark. 242.

[1] Day v. Day, 59 Miss. 318.

[2] Huston v. Foster, 1 Watts, 477; Watt v. Gilmore, 2 Yeates, 330.

[3] Hendrix v. Boggs, 15 Neb. 469; Sullivan v. Merriam, 16 Neb. 157; Baldwin v. Merriam, 16 Neb. 199; Seaman v. Thompson, 16 Neb. 546; Shelley v. Towle, 16 Neb. 194.

[4] Dunlap v. Henry, 76 Mo. 106; Williams v. McLanahan, 67 Mo. 499; Ryan v. Carr, 46 Mo. 483.

[5] Caruthers v. McLaran, 56 Miss. 371.

[6] Games v. Stiles, 14 Peters, 332, 10 L. ed. 481. See vol. 1, § 294, *ante*.

[7] Stebbins v. Guthrie, 4 Kan. 353.

[8] Bell v. Gordon, 55 Miss. 45.

[9] Tilson v. Thompson, 10 Pick. 359.

upon its face that the sale was made at some time not authorized by law. The officer, under the statute, had the power, and it was his duty, when from any good cause the property could not be advertised and sold on the first Monday in October, to make the sale on the first Monday of the next succeeding month in which it could be made.[1] In Kansas, a tax deed is not void because it states that the sale was on May 6, 1870, "at the sale begun and publicly held on the first Tuesday of May, 1870," when as a matter of fact the first Tuesday fell on the third day of May.[2] In Wisconsin, in the absence or disability of the county clerk, a deputy may sign a tax deed, although the statute may confer upon him no express authority to do so.[3] The statute, in substance, must be strictly followed.[4] In Missouri, it is held that a tax deed executed by the county treasurer as *ex officio* collector is void and inadmissible in evidence, where there is no proof that the office of collector had devolved upon the treasurer, by the adoption by the county of township organization.[5]

§ 1411. **Execution of deed after expiration of officer's term.**—If not provided for distinctly in the statute, a question may arise as to the proper person to execute a deed after the expiration of the term of the officer who made the sale. Should the deed be made by the person who made the sale, or by his successor in office? In a case in Kentucky,

[1] Eldridge v. Kuehl, 27 Iowa, 160. For other cases upon the execution of deeds, see Stierlien v. Daley, 37 Mo. 483; Lain v. Cook, 15 Wis. 446; Cutler v. Hurlburt, 29 Wis. 152; Dillingham v. Brown, 38 Ala. 311; Wakeley v. Mohr, 18 Wis. 321; Hardin v. Crate, 78 Ill. 533; Thompson v. Schuyler, 7 Ill. 271; Games v. Stiles, 14 Peters, 332, 10 L. ed. 481; Love v. Welch, 33 Iowa, 192; Sully v. Kuehl, 30 Iowa, 275.

[2] Harris v. Curran, 32 Kan. 580.

[3] Gilkey v. Cook, 60 Wis. 133.

[4] Russell v. Mann, 22 Cal. 131; Kelsey v. Abbott, 13 Cal. 609; Ferris v. Coover, 10 Cal. 632.

[5] Spurlock v. Dougherty, 81 Mo. 171. A deputy may sign the deed in the absence or disability of his principal: Gilkey v. Cook, 60 Wis. 133.

it was decided that the former was the proper person to execute the deed. "The power to sell and convey land for the nonpayment of the taxes due on it," said the court, "is in its nature entire; and the officer who sells must convey, though his office may have expired before the latter act shall have been performed. The act of assembly, under which the sale in this case was made, plainly presupposes that this may be done; for it not only makes no provision for the conveyance to be made by any subsequent officer, but after authorizing the sheriff or collector to sell, and directing the land to be laid off by the county surveyor, it provides that *the* sheriff or collector shall convey, and thus, by the use of the definite article, obviously alluding to the same officer who had sold, and authorizing him to convey, without regard to the circumstances whether he had gone out of office or not. The case is, indeed, in principle, analogous to that of a sale and conveyance of land under execution; and in that case it has been decided that the sheriff who had sold might, after he had gone out of office, convey."[6] But in Pennsylvania, the opposite rule finds favor. In that State, a deed executed by a person after the expiration of his term of office, is considered a nullity, "as much so as if it had been executed by a stranger who never held the office."[7]

§ 1412. **Comments.**—This matter is probably regulated in most of the States by the statute. But where the statute is silent, it would seem that either the officer whose term expired, or his successor, without distinction, should have power to execute the deed. The purchaser is entitled to have his deed from some source, and we consider that the

[6] Graves v. Hayden, 2 Litt. 64, citing on the question of the power of the sheriff to execute a deed after a sale on execution, Allen v. Trimble, 4 Bibb, 21, 7 Am. Dec. 726. See, also, Elkin v. The People, 3 Scam. (4 Ill.) 207, 36 Am. Dec. 541.

[7] Hoffman v. Bell, 61 Pa. St. 444, and cases cited.

rules applicable to sales on execution should, on this question, apply to tax sales, and that the officer making the sale has power to execute a deed after the expiration of his term of office.

§ 1413. Execution of second deed.—If the recitals in a tax deed do not conform to the facts, the officer may execute a second deed.[8] The decisions sustaining this rule are based on the principle that it is the duty of the officer to execute a good and sufficient deed of the land sold to the purchaser. He can be compelled to do this by *mandamus,* if he neglects to perform his duty. He should, therefore, be allowed to do voluntarily what the courts have power to compel him to do. Such a course can injure no one, as the deed is only, as a general proposition, *prima facie* evidence of the truth of the correction, and if the statements contained in the second deed are untrue, they can be rebutted.[9] But an officer has no power to execute a second deed containing a misstatement of the facts which have occurred prior to its execution. Such a deed would be void.[1]

§ 1414. Purchaser's right to a correct deed.—If a deed is void because it shows a sale in gross instead of in parcels, the officer may execute a second and corrected deed, showing that the sale was made in parcels, if such is the fact as manifested by the record of sales.[2] To the argument that by the making of the first deed the officer exhausts his power, notwithstanding he failed to convey the title either by mis-

[8] Gould v. Thompson, 45 Iowa, 456; Gray v. Coan, 30 Iowa, 536; Graves v. Bruen, 6 Ill. 167; Dillingham v. Brown, 38 Ala. 311; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Bulkley v. Callahan, 32 Iowa, 461; Corbin v. Bronson, 28 Kan. 534; Hurley v. Street, 29 Iowa, 429; Genther v. Fuller, 36 Iowa, 604; Douglas v. Nuzum, 16 Kan. 515.

[9] Maxcy v. Clabaugh, 1 Gilm. 26.

[1] Gould v. Thompson, 45 Iowa, 456.

[2] McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214.

recital of the facts or otherwise, Mr. Chief Justice Cole, in delivering the opinion of the court, remarked that the answer was not difficult. "The purchaser at the sale (the proceedings prior thereto having conformed to the statute, in so far as to make them valid and binding) acquires the right to have the legal title conveyed to him at the expiration of the time of redemption (in case no redemption is made); and it is the duty of the treasurer to convey that title to him. Any act of the treasurer which comes short of conveying the title (the purchaser having the right thereto), although he may have intended to convey it, does not discharge his duty to convey, and cannot, therefore, exhaust his power. For, having the power to convey, that power must continue until he does convey. If he should make a deed void on its face, and hence *no deed,* or make a deed to the wrong person, or of the wrong parcel of land, such acts would not exhaust his power to make a valid deed to the right person for the right piece of land. For, having the power to convey the land sold to the purchaser, he can only exhaust it by the doing of that particular thing. *The right of the purchaser* to be clothed with legal title is clear and certain by the express terms of the statute; and *the power of the treasurer* to convey that title to him is also certain from the same statute, and that this power is *a continuing one* until exercised, or barred by limitation, is well settled, and, indeed, is undisputed. Now, this right of the purchaser is not satisfied or fulfilled until he is clothed with that legal title; nor is the duty of the treasurer performed, or his power to convey exhausted, until he does clothe the purchaser with the legal title. He may do any number of acts intending to convey, or make innumerable attempts to convey, but until he does convey the legal title he has not performed his duty, nor exhausted his power, nor satisfied the right of the purchaser. The proposition is too plain to admit of doubt, and too axiomatic to allow of demonstration. But, it is also urged that if the treasurer

can make a second deed, then he can make three, thirty, or a hundred, and thereby the door to fraud will be opened wide and great confusion of titles result. The answers to this position are numerous; and, *first,* it may be remarked, that the presumption of law is, that a public officer will do his duty fairly and honestly, and not that he will act *mala fides* or fraudulently in the discharge of his clear, statutory duty; and hence, to rest an adjudication upon the presumption that he will or may act fraudulently and in disregard of his duty, is to decide upon a presumption in the face of and contrary to law. And *second,* if the treasurer's first or second deed passes the title according to the right of the purchaser, and pursuant to his duty under the statute, then any number of deeds thereafter cannot confuse the title or prejudice the owner. If there shall be one hundred good deeds to the same person for the same land, they all will only invest him with one title, and he has a right to that and cannot get more. All the deeds the purchaser may get beyond that which convey to him the title, with which he has the right to be clothed, only increase his costs and expenses and cannot strengthen his title, nor do they confuse it. Further answers it is not necessary to make. All that has been said upon this question of the right of a purchaser to have, and the duty of the treasurer to make a second or corrected deed, has been grounded upon the idea that the proceedings prior to the deed have been such as to entitle the purchaser to demand, or authorize the treasurer to make a deed conveying the title. If there have been such acts or omissions as, under the statute, would defeat the right of the purchaser to have, and the power of the treasurer to convey, the legal title, then, of course, neither the first nor the second and corrected deed can be legally or properly made. For, in every instance, the power of the treasurer to make a deed depends upon the validity of the prior essential steps or proceedings; and his power to make a second and corrected deed must rest upon the fact of such

validity, and that the correction as made, fairly and legitimately appear from the records themselves, or are properly deducible therefrom, and are not facts *in pais* merely, or rseting alone in the memory of the treasurer; and certainly so, when such facts should regularly and legally be made of record." [3]

§ 1415. **Who may acquire title.**—A person whose duty it is to pay the taxes, cannot acquire title by a purchase at a tax sale.[4] The only effect that a purchase at a tax sale by one whose duty it was to pay the tax can have, is to extinguish the tax.[5] An agent cannot acquire title to the lands

[3] In McCready v. Sexton, 29 Iowa, 356, 382, 4 Am. Rep. 214.

[4] Christy v. Fisher, 58 Cal. 256; Barrett v. Amerein, 36 Cal. 322; Coppinger v. Rice, 33 Cal. 408; Garwood v. Hastings, 38 Cal. 216; Kelsey v. Abbott, 13 Cal. 609; Reily v. Lancaster, 39 Cal. 354; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Coxe v. Wolcott, 27 Pa. St. 154; Smith v. Lewis, 20 Wis. 350; Edgerton v. Schneider, 26 Wis. 385; Avery v. Judd, 21 Wis. 262; Phelan v. Boylan, 25 Wis. 679; Bowman v. Eckstein, 46 Iowa, 485; Bassett v. Welch, 22 Wis. 175; Higgins v. Crosby, 40 Ill. 260; Oldhams v. Jones, 5 Mon. B. 467; Bertram v. Cook, 32 Mich. 518; Savings & Loan Society v. Ordway, 38 Cal. 679; Fitzgerald v. Spain, 30 Ark. 95; Shay v. McNamara, 54 Cal. 169; McLaughlin v. Green, 48 Miss. 175; Haskell v. Putnam, 42 Me. 244; Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729; Carithers v. Weaver, 7 Kan. 110; Oliver v. Crosswell, 42 Ill. 41; Middletown Sav. Bank v. Bacharach, 46 Conn. 513; Stinson v. Richardson, 48 Iowa, 541; Goodrich v. Kimberly, 48 Conn. 395; Frye v. Bank of Illinois, 11 Ill. 367; Matthews v. Light, 32 Me. 305; Brown v. Simons, 44 N. H. 475; Varney v. Stevens, 22 Me. 331; Swift v. Agnes, 33 Wis. 228; Taylor v. Snyder, Walk. Ch. 492; McMinn v. Whelan, 27 Cal. 300; Coxe v. Gibson, 27 Pa. St. 160, 67 Am. Dec. 454; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Gould v. Day, 94 U. S. 405, 24 L. ed. 232; Cooley v. Waterman, 16 Mich. 366; Prettyman v. Walston, 34 Ill. 175; Krutz v. Fisher, 8 Kan. 90; Dunn v Snell, 74 Me. 24; Gardiner v. Gerrish, 23 Me. 46; Coombs v. Warren, 34 Me. 89; Fuller v. Hodgdon, 25 Me. 243; Haskell v. Putnam, 42 Me. 244; Willard v. Strong, 14 Vt. 532, 39 Am. Dec. 240.

[5] Williamson v. Russell, 18 W. Va. 613; Johnston v. Smith, 70 Ala. 117; Quinn v. Quinn, 27 Wis. 168; Foley v. Kirk, 33 N. J. Eq. 171; Voris v. Thomas, 12 Ill. 442;

under his charge by bidding at a tax sale.[6] A party claiming title to the land, cannot aid his title by buying at a tax sale.[7]

§ 1416. **Purchase by party in possession.**—One in possession of land claiming title, although he may be a trespasser, cannot acquire a valid tax title.[8] A tenant in common, whether in possession or not, cannot acquire a title against his cotenants by purchasing the land held in common at a sale for the payment of taxes.[9] But when the time for

Haskell v. Putnam, 42 Me. 244; Garwood v. Hastings, 38 Cal. 216. In Blake v. Howe, 1 Aiken, 306, 15 Am. Dec. 681, the editor of the American Decisions has a valuable note upon the subject of who may purchase at a tax sale.

[6] Shay v. McNamara, 54 Cal. 169; Krutz v. Fisher, 8 Kan. 90; Franks v. Morris, 9 W. Va. 664; Bartholomew v. Leech, 7 Watts, 472. See Barton v. Moss, 32 Ill. 50; Lamb v. Irwin, 69 Pa. St. 436; McMahon v. McGraw, 26 Wis. 614; Bowman v. Officer, 53 Iowa, 642; Jury v. Day, 54 Iowa, 573; Duffit v. Tuhan, 28 Kan. 292; Linsley v. Sinclair, 24 Mich. 380; Baker v. Whiting, 3 Sum. 475; Schedda v. Sawyer, 4 McLean, 181; Wright v. Walker, 30 Ark. 44; Maxfield v. Willey, 46 Mich. 52.

[7] Thomas v. Stickle, 32 Iowa, 71; Jacks v. Dyer, 31 Ark. 334. See Wambole v. Foote, 2 Dakota, 1.

[8] Bassett v. Welch, 22 Wis. 175; Barrett v. Amerein, 36 Cal. 322; Busch v. Huston, 75 Ill. 343; Kelsey v. Abbott, 13 Cal. 609; Reily v. Lancaster, 39 Cal. 357; Garwood v. Hastings, 38 Cal. 217; McMinn v. Whelan, 27 Cal. 300. See, also, Coppinger v. Rice, 33 Cal. 408; Gilman v. Riopelle, 18 Mich. 163; Whitney v. Gunderson, 31 Wis. 378; Tweed v. Metcalf, 4 Mich. 586; Moss v. Shear, 25 Cal. 38, 85 Cal. 94; Bernal v. Lynch, 36 Cal. 146; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Gwynn v. McCauley, 32 Ark. 97. And see, also, for other instances and qualifications, Jeffery v. Hursh, 45 Mich. 59; Leppo v. Gilbert, 26 Kan. 138; Andrews v. Worcester Ins. Co., 5 Allen, 65; Hunt v. Gaines, 33 Ark. 267; Brown v. Simons, 44 N. H. 475; Home Sav. Bank v. Boston, 131 Mass. 278; Duffit v. Tuhan, 28 Kan. 292; Bowman v. Cockerill, 6 Kan. 332. And see Blackwood v. Van Vliet, 30 Mich. 118.

[9] Davis v. King, 87 Pa. St. 261; Butler v. Porter, 13 Mich. 292; Burns v. Byrne, 45 Iowa, 288; Page v. Webster, 8 Mich. 263, 77 Am. Dec. 446; Downer v. Smith, 38 Vt. 464; Austin v. Barrett, 44 Iowa, 488; Watkins v. Eaton, 30 Me. 529, 50 Am. Dec. 637; Frentz v. Klotsch, 28 Wis. 312; Fallon v. Chidester, 46 Iowa, 588, 26 Am. Rep. 164; Shell v. Walker, 54 Iowa 388; Weare v. Van Meter,

redemption has expired, a tenant can purchase the tax title from another.[1] A person in possession of the land under a mortgage cannot buy in the title at a tax sale.[2] Nor can a junior mortgagee acquire a title which will extinguish the lien of a senior mortgagee.[3] The duty of paying the taxes rests upon the mortgagor, and he cannot derive a title from his failure to pay the taxes as against his mortgagee.[4] As it is the duty of a tenant for life to pay all taxes that may be

42 Iowa, 128, 20 Am. Rep. 616. See, also, Brown v. Hogle, 30 Ill. 119; Lewis v. Ward, 99 Ill. 525; Bender v. Stewart, 75 Ind. 91; Dubois v. Campau, 24 Mich. 360; Dunn v. Snell, 74 Me. 24; Bracken v. Cooper, 80 Ill. 221; Tice v. Derby, 59 Iowa, 312; Flinn v. McKinley, 44 Iowa, 70; Fair v. Brown, 40 Iowa, 209; Chickering v. Faile, 38 Ill. 342; McConnel v. Konepel, 46 Ill. 519; Garretson v. Scofield, 44 Iowa, 35; Busch v. Huston, 75 Ill. 343; Lloyd v. Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Williams v. Gray, 3 Me. 207, 14 Am. Dec. 234; Allen v. Poole, 54 Miss. 323; Maul v. Rider, 51 Pa. St. 377; Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113; Anson v. Anson, 20 Iowa, 55, 89 Am. Dec. 514; Phelan v. Boylan, 25 Wis. 679; Baker v. Whiting, 7 Sum. 476.

[1] Keele v. Cunningham, 2 Heisk. 288.

[2] Leppo v. Gilbert, 26 Kan. 138; Andrews v. Worcester Ins. Co., 5 Allen, 65; Brown v. Simons, 44 N. H. 475; Home Sav. Bank v. Boston, 131 Mass. 278.

[3] Fair v. Brown, 40 Iowa, 209; Garretson v. Scofield, 44 Iowa, 37.

[4] Porter v. Lafferty, 33 Iowa, 254; Dayton v. Rice, 47 Iowa, 431; Frye v. Bank of Illinois, 11 Ill. 383; Dunn v. Snell, 74 Me. 22. A person who is in possession of land and claims title to the same ought to pay the taxes, and his purchase operates as payment: Rule v. Broach, 58 Miss. 552; Reily v. Lancaster, 39 Cal. 354; Kelsey v. Abbott, 13 Cal. 609; Bernal v. Lynch, 36 Cal. 135; McMinn v. Whelan, 27 Cal. 300; Christy v. Fisher, 58 Cal. 256; Barrett v. Amerein, 36 Cal. 322; Garwood v. Hastings, 38 Cal. 216; Jacks v. Dyer, 31 Ark. 333; Jones v. Davis, 24 Wis. 229; Lybrand v. Haney, 31 Wis. 230; Pool v. Ellis, 64 Miss. 555; Stubblefield v. Borders, 92 Ill. 279; Rodman v. Sanders, 44 Ark. 504; Gwynn v. McCauley, 32 Ark. 97; Stears v. Hellenbeck, 38 Iowa, 550; Fallas v. Pierce, 30 Wis. 443; Whitney v. Gunderson, 31 Wis. 359. But if the party does not claim title he is not obligated to pay taxes: Weichselbaum v. Curlett, 20 Kan. 709, 27 Am. Rep. 204; Bowman v. Cockrill, 6 Kan. 311; Sands v. Davis, 40 Mich. 14; Buckley v. Taggart, 62 Ind. 236; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Blakeley v. Bestor, 13 Ill. 709; Curtis v. Smith, 42 Iowa, 665; Seaver v. Cobb, 98 Ill. 200.

levied during the continuance of the tenancy, the relation that he occupies is such that he cannot acquire a title by a failure to pay the taxes.[5] A tenant whose duty it is to pay all taxes cannot acquire a tax title during his tenancy.[6] But where it is not the duty of the lessee to pay the taxes, he is at liberty to purchase.[7]

§ 1417. Purchase by party whose land is assessed jointly with another.—If the owner of a distinct tract of land fails to pay his taxes, and the land with that of others is sold jointly for the delinquency, a purchase by him at the tax sale is void, because he was in default in failing to pay taxes properly chargeable against him.[8] Before he is at liberty to purchase he must pay the taxes on the part owned by him. When he has done this he has the same right to acquire a title to the other part of the tract as a stranger has.[9]

[5] Varney v. Stevens, 22 Me. 334; Whyte v. Nashville, 2 Swan, 364; Garland v. Garland, 73 Me. 98; Cannon v. Barry, 59 Miss. 289; Bidwell v. Greenshield, 2 Abb. N. C. 431.

[6] Carithers v. Weaver, 7 Kan. 110; Williamson v. Russell, 18 W. Va. 613. And see Shepardson v. Elmore, 19 Wis. 424; Seaver v. Cobb, 98 Ill. 200.

[7] Weichselbaum v. Curlett, 20 Kan. 709, 27 Am. Rep. 204; Keith v. Keith, 26 Kan. 42; Duffit v. Tuhan, 28 Kan. 296; Ferguson v. Etter, 21 Ark. 160, 76 Am. Dec. 361; Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442. See Waggener v. McLaughlin, 33 Ark. 201.

[8] Cooley v. Waterman, 16 Mich. 366.

[9] Lewis v. Ward, 99 Ill. 525. Mr. Justice Scott, in delivering the opinion of the court, said (p. 527): "The law is well settled that certain persons, on account of their relations to the property, or their obligation to pay the taxes thereon, are forbidden by the policy of the law to become purchasers of the lands at a tax sale. The rule admits of no exception, that a purchase by one whose duty it is to pay the taxes operates as payment, and nothing more. Where it is made to appear it was the duty of the party to pay the taxes on the lands, the disqualification at once attaches, and a purchaser will not be permitted to derive an advantage from that which it was his plain duty, under the law, to do. The rule on this subject is plain, and is so just that it commends itself to the common judgment as right. The only difficulty lies in the application of the rule to particular cases. It has been extended

But a person who is not in possession, and whose only claim to an interest in the land is founded upon a void tax deed, has the right to purchase at a subsequent sale, and to claim title by a deed following such sale.[1] If a mortgagor has agreed to pay all taxes that may be levied on the estate, he cannot allow it to be sold for taxes, and acquire by a purchase at the sale a title against the mortgagee.[2]

§ 1418. **Purchase by attorney.**—A person who was in some suits the attorney of a deceased owner during his life is not, by this fact, prevented from purchasing.[3] But his purchase of land in relation to which he has been employed, is inconsistent with the duty which he owes to his client. Although such a purchase may have been made in good faith, it nevertheless is void.[4]

to a case where the land of the party making the purchase was taxed as one parcel with that of another, and the whole sold together. That is precisely the case here. The whole of the north half of lot 316 was assessed to plaintiff. Of the north half of the lot plaintiff at the time owned twenty-five feet, and Woodward owned the other fifty feet. The entire tract was sold as it was assessed, as one parcel, and was purchased by Woodward, who owned, as has been seen, two-thirds of the property sold to himself. These facts bring the case clearly within the inhibition of the principle stated."

[1] Neal v. Frazier, 63 Iowa, 451; Mallory v. French, 44 Iowa, 133. See, also, Bowman v. Cockrill, 6 Kan. 331; Coxe v. Gibson, 27 Pa. St. 165, 67 Am. Dec. 454; Blackwood v. Van Vliet, 30 Mich. 118.

[2] Dunn v. Snell, 74 Me. 22.

[3] Pack v. Crawford, 29 Ark. 489.

[4] Wright v. Walker, 30 Ark. 44. An agent or attorney having charge of property, cannot purchase at a tax sale and obtain the title of his principal: Woodman v. Davis, 32 Kan. 344; Coxe v. Wolcott, 27 Pa. St. 154; Bartholomew v. Leech, 7 Watts, 472; McMahon v. McGraw, 26 Wis. 614; Franks v. Morris, 9 W. Va. 664; Murdoch v. Milner, 84 Mo. 96; Morris v. Joseph, 1 W. Va. 256, 91 Am. Dec. 386; Barton v. Moss, 32 Ill. 50; Gonzalia v. Bortelsman, 143 Ill. 634; Wright v. Walker, 30 Ark. 44; Bowman v. Officer, 26 Wis. 614. But see Eckote v. Myers, 41 Iowa, 324. A husband, it is held, occupies a relation of trust, and cannot obtain a title to the separate estate of his wife at a tax sale: Laton v. Balcom, 64 N. H. 92; Willard v. Ames, 130 Ind. 351. But see Swift v. Agnes, 33 Wis. 229.

§ 1419. **Presumptions as to validity of deed.**—Where the statute does not prescribe a different rule, no presumption can be indulged as to the regularity of the proceedings terminating in a deed. The purchaser at the tax sale is compelled to show that every material prerequisite has been complied with.[5] It must be shown that the taxes were levied, and that the officer making the sale had power to do so.[6] So it must be shown that the officer has taken the oath of office.[7] The existence and legality of the assessment must also be shown.[8] From the listing of the land for taxation, to the consummation of the title by delivery of the deed, every step required to be taken is a separate and independent fact, whose existence is necessary to uphold the title.[9]

[5] Stoudenmire v. Brown, 57 Ala. 481; Cooke v. Pennington, 15 S. C. 185; Chamberlain v. Sutherland, 4 Bradw. 494; Haseltin v. Mosher, 51 Wis. 447; Early v. Doe, 16 How. 610, 14 L. ed. 1079; Howe v. Russell, 36 Me. 115. See, also, Hall v. Collins, 4 Vt. 316; Brown v. Veazie, 25 Me. 362; Latimer v. Lovett, 2 Doug. 204; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216; Williams v. Peyton, 4 Wheat. 77, 4 L. ed. 518; Doe v. Sweetser, 2 Ind. 649; Waldron v. Tuttle, 3 N. H. 340; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Games v. Stiles, 14 Peters, 322, 10 L. ed. 476; Stevens v. McNamara, 36 Me. 176, 58 Am. Dec. 740; Holt v. Hemphill, 3 Ohio, 232; Irving v. Brownell, 11 Ill. 402; Flanagan v. Grimmet, 10 Gratt. 426; Steuart v. Meyer, 54 Md. 466; Garrett v. White, 3 Ired. Eq. 131; Alexander v. Walter, 8 Gill, 239, 50 Am. Dec. 688; Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Johnson v. Elwood, 53 N. Y. 435; Dyer v. Boswell, 39 Md. 465; Alvord v. Collin, 20 Pick. 418; Minor v. Natchey, 4 Smeeds & M. 627, 43 Am. Dec. 488; Cruger v. Dougherty, 43 N. Y. 107; Stead v. Course, 4 Cranch, 403, 2 L. ed. 660.

[6] Jordan v. Rouse, 1 Jones (N. C.) 119; Pentland v. Stewart, 4 Dev. & B. 386; Avery v. Rose, 4 Dev. 549; Garrett v. White, 3 Ired. Eq. 131; Love v. Gates, 4 Dev. & B. 363.

[7] Payson v. Hall, 30 Me. 319.

[8] Person v. O'Neal, 32 La. Ann. 236: Sutton v. Calhoun, 14 La. Ann. 209; Renshaw v. Imboden, 31 La. Ann. 661.

[9] Gavin v. Shuman, 23 Ind. 32; Beatty v. Mason, 30 Md. 409; Ellis v. Kenyon, 25 Ind. 134; Smith v. Kyler, 74 Ind. 575; Farrar v. Clark, 85 Ind. 451. And see, also, Griffin v. Dogan, 48 Miss. 11; Hunt v. McFadgen, 20 Ark. 277; Elliott v. Eddins, 24 Ala. 508; Caston v. Caston, 60 Miss. 475; Woolbridge v. State, 43 N. J. L. 262; Blakeney v. Ferguson, 8 Ark. 272; Nalle v.

§ 1420. **Deed as evidence.**—The burden of proof may be shifted by statute, and it is competent for the legislature to provide that a tax deed shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with.[1] But the deed should recite enough of the

Fenwick, 4 Rand. 585; Long v. Burnett, 13 Iowa, 29, 81 Am. Dec. 420; Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773; Doughty v. Hope, 3 Denio, 595; Case v. Dean, 16 Mich. 12; Beirne v. Burdett, 52 Miss. 795; Moore v. Cooke, 40 Iowa, 290; Guisebert v. Etchison, 51 Md. 486; Yelverton v. Steele, 36 Mich. 62; Hilton v. Bender, 69 N. Y. 75; Hadley v. Tankersley, 8 Tex. 12; Coxe v. Deringer, 82 Pa. St. 236.

[1] Roby v. Chicago, 64 Ill. 447; Burbank v. People, 90 Ill. 555; Illinois Cent. R. R. Co. v. Phillips, 55 Ill. 194; Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Hart v. Smith, 44 Wis. 223; Dequasie v. Harris, 16 W. Va. 354; Orono v. Veazie, 57 Me. 517; Commonwealth v. Thurlow, 24 Pick 374; Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Sullivan v. Oneida, 61 Ill. 247; Fales v. Wadsworth, 23 Me. 553; Groesbeck v. Seeley, 13 Mich. 329; Forbes v. Halsey, 26 N. Y. 53; Webb v. Den, 17 How. 576, 15 L. ed. 35; Freeman v. Thayer, 33 Me. 76; Townsend v. Radcliffe, 63 Ill. 11; Wetherbee v. Dunn, 32 Cal. 106; Kendall v. Kingston, 5 Mass. 524; Williams v. Kirtland, 13 Wall. 310, 20 L. ed. 684; Pillon v. Roberts, 13 How. 472, 14 L. ed. 228; Flanagan v. Grimmet, 10 Gratt. 421; Morton v. Reeds, 6 Mo. 74; Broughton v. Sherman, 21 Minn. 431; Steadman v. Planter's Bank, 2 Eng. 426; Cairo & T. R. R. Co. v. Parks, 32 Ark. 147; Graves v. Bruen, 11 Ill. 431; Stoudenmire v. Brown, 57 Ala. 481; Lassitter v. Lee, 68 Ala. 287; Greene v. Williams, 58 Miss. 752; Hardie v. Chrisman, 60 Miss. 671; Jackson v. Shepard, 7 Cowen, 88, 17 Am. Dec. 502; Jones v. Devore, 8 Ohio St. 430; Rhodes v. Gunn, 35 Ohio St. 387; Fuller v. Armstrong, 53 Iowa, 683. See, also, Hogins v. Brashears, 13 Ark. 242; Thweaht v. Black, 30 Ark. 732; Patrick v. Davis, 15 Ark. 363; Merrick v. Hutt, 15 Ark. 331; Thornton v. Smith, 36 Ark. 508; Biscoe v. Coulter, 18 Ark. 423; Norris v. Russell, 5 Cal. 249; Early v. Whittingham, 43 Iowa, 164; Easton v. Savery, 44 Iowa, 655; Genther v. Fuller, 36 Iowa, 604; McCready v. Sexton, 29 Iowa, 656; Hobson v. Dutton, 9 Kan. 477; Ide v. Finneran, 29 Kan. 569; McCauslin v. McGuire, 14 Kan. 234; Gardenhire v. Mitchell, 21 Kan. 87; Bowman v. Cockrill, 6 Kan. 311; Young v. Rheinecher, 25 Kan. 367; Allen v. Robinson, 3 Bibb, 326; Hord v. Bodley, 1 Marsh. J. J. 79; Westbrook v. Willey, 47 N. Y. 457; Doughty v. Hope, 3 Denio, 594; Sheehy v. Hinds, 27 Minn. 259; Striker v. Kelly, 2 Denio, 323; O'Grady v. Barnishel, 23 Cal. 287; Ives v. Kimball, 1 Mich. 308;

proceedings to show authority for the sale.[2] Statutes of this kind, however, are strictly construed.[3] In Indiana, if a tax deed fails to show that the personal property of the person assessed had been exhausted before the sale of his real estate, the deed, unless accompanied by evidence of this fact, is not admissible as evidence of title.[4] Unless recitals are made by statute evidence of the facts recited, they do not show that such facts existed, and the party claiming under the deed must prove that the requirements of the statute as to tax proceedings have been complied with.[5] In California, a recital in a tax deed as to the person to whom the land is assessed is conclusive of such fact.[6]

§ 1421. Prima facie evidence.—Where there is no statute providing that the recitals in a tax deed shall pass

Marshall v. Benson, 48 Wis. 598; Greve v. Coffin, 14 Minn. 345, 100 Am. Dec. 229; Colman v. Shattuck, 62 N. Y. 348; Virden v. Bowers, 55 Miss. 1.

[2] Turney v. Yeoman, 14 Ohio, 208; Woodward v. Sloan, 27 Ohio St. 592.

[3] Shoalwater v. Armstrong, 9 Humph. 217; Moulton v. Blaisdell, 24 Me. 283; Dequasie v. Harris, 16 W. Va. 354; Carlisle v. Longworth, 5 Ohio, 368; Gavin v. Shuman, 23 Ind. 32; Parker v. Smith, 4 Blackf. 70; Stierlin v. Daly, 37 Mo. 483; Garrett v. Wiggins, 2 Ind. 335.

[4] Ward v. Montgomery, 57 Ind. 276.

[5] Worthing v. Webster, 45 Me. 270, 71 Am. Dec. 543. And see generally Wright v. Cradlebaugh, 3 Nev. 349; Dubois v. Campau, 24 Mich. 360; Smith v. Bodfish, 27 Me. 289; Rackliff v. Look, 69 Me. 520; Lawrence v. Zimpleman, 37 Ark. 644; Smith v. Corcoran, 7 La. 46; Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773; Williams v. Peyton, 4 Wheat. 77, 4 L. ed. 518; Games v. Stiles, 14 Pet. 322, 10 L. ed. 476; Early v. Doe, 16 How. 619, 14 L. ed. 1083; Jesse v. Preston, 5 Gratt. 120; Garret v. Wiggins, 1 Scam. 335, 30 Am. Dec. 653; Cooke v. Pennington, 15 S. C. 193; Harvey v. Mitchell, 31 N. H. 575; Gage v. Lightburn, 93 Ill. 248.

[6] Brady v. Dowden, 59 Cal. 51. The legislature may change the common law and make a tax deed prima facie evidence of the regularity of the proceedings upon which it is founded. Carnahan v. Sieber Cattle Co., 34 Colo. 257, 82 Pac. 592; Farmers Loan & Trust Co. v. Wall, 129 Iowa, 651, 106 N. W. 160. See as curing insufficient description in notice and tax list. Lee v. Crawford, 10 N. D. 482, 88 N. W. 97.

title to the land and shall be *prima facie* evidence of title, the party claiming under the deed has the burden of proving the truth of the recitals.[7] Showing that the assessment was illegal will overcome the *prima facie* evidence of title supplied by the recitals of the tax deed.[8] If a statute debars a claimant of land from disputing a tax title unless he shows that at the time of the sale or subsequently he, or the person through whom he claims, held a title acquired from the State or the United States, the claimant establishes a *prima facie* case by producing such evidence as raises a presumption of title in him.[9] The *prima facie* evidence of sale furnished by a deed may be rebutted by proof that there was no public sale, and that the alleged sale took place at a time to which the prior sale had been adjourned.[1] The effect of a tax deed as *prima facie* evidence of the regularity of the proceedings on which it is based, is not affected by the fact that it was taken out by the defendant during the pendency of an action. The burden of proving irregularity is cast upon the plaintiff.[2]

§ 1422. **Deed as conclusive evidence.**—It may be provided by statute that a tax deed shall be conclusive evidence of the regularity of prior proceedings.[3] But it is held that a law making a tax deed conclusive evidence of the regularity of the essential prerequisites for the exercise of the taxing

[7] Pierce v. Low, 51 Cal. 580.

[8] Bidleman v. Brooks, 28 Cal. 72.

[9] Gamble v. Horr, 40 Mich. 561.

[1] Thompson v. Ware, 43 Iowa, 455.

[2] Hart v. Smith, 44 Wis. 213.

[3] McCready v. Sexton, 29 Iowa, 357, 4 Am. Rep. 214; Madson v. Sexton, 37 Iowa, 562; Allen v. Armstrong, 16 Iowa, 508; Jeffrey v. Brokaw, 35 Iowa, 505; Magruder v. Esmay, 35 Ohio St. 221; White v. Flynn, 23 Ind. 46; Abbott v. Lindenbower, 42 Mo. 162; Rima v. Cowen, 31 Iowa, 125; Easton v. Perry, 37 Iowa, 681; Smith v. Easton, 37 Iowa, 584; Woodbridge v. State, 43 N. J. L. 262; Clark v. Thompson, 37 Iowa, 536; Gould v. Thompson, 45 Iowa, 451; Shawler v. Johnson, 52 Iowa, 476; Parker v. Sexton, 29 Iowa, 421; Huey v. Van Wie, 23 Wis. 613; Scofield v. McDowell, 47 Iowa, 467; Bullis v. Marsh, 56 Iowa, 747; Smith v. Cleveland, 17 Wis. 556; Hurley v. Powell, 31 Iowa, 64.

power is unconstitutional, as such a law deprives a person of his property without due process of law.[4] The statute in Idaho Territory provided that "any deed derived from a sale

[4] McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Powers v. Fuller, 30 Iowa, 476. This question was very thoroughly considered in the case of McCready v. Sexton, 29 Iowa, 356, 388, 4 Am. Rep. 214. Mr. Chief Justice Cole, after examining some of the prior cases in which the question had been referred to, said: "Let us now examine the question more carefully and critically in the light of both principle and precedent. The right of taxation and the right of eminent domain are the highest sovereign rights. They are essential to and necessarily inhere in every sovereign power. They are different rights, and are differently exercised, and, though absolute and sovereign in their character, they are nevertheles to be exercised only in acordance with certain fundamental principles. And although the taking of property by taxation is not strictly, or in its technical sense, the taking of property by due process of law, yet it has never been held or claimed that the legislature might confiscate property for the nonpayment of taxes thereon. A process prescribed by law has ever been held necessary in order to the rightful exercise of the taxing power. No person has ever claimed, and certainly no court has ever decided, that it would be competent for a legislature to declare that if the owner of real estate failed to pay the proportion of taxes due thereon, on or before a date named, that any other person might pay the taxes and thereby become owner of the land. But, on the contrary, it has ever been held that certain steps must be taken before the right to demand the tax, or to sell the property for the nonpayment thereof, arose. These acts, it is true, are such as are absolutely relatively necessary in order to ascertain and fix the proper amount of taxes chargeable to each item of property. These steps, while they are not by the books technically 'due process of law,' nevertheless are very analogous to the steps ordinarily attending judicial proceedings *in rem*. There is, *first*, the *listing and assessing* of the property. These may be likened to the seizure of property by judicial process, whereby the jurisdiction over the *rem* attaches. Then, *secondly*, there is the levy of the tax upon the property, in proportion to its value, so much per centum. This may be likened to a judgment *in rem*, condemning the property to the payment of the claim for which it was seized. Then, *thirdly*, there is the *tax warrant*, or an express statutory provision, authorizing the collector to sell the property for the payment of the taxes thus levied upon it. This is very like the order or execution issued by a court for the sale of the *rem*, which had before been seized and condemned by it. Then, *fourthly*, there is the

of real estate, under the provisions of this act, shall be conclusive evidence of title, except as against actual frauds, or prepayment of the taxes upon which such sale was made." But

sale of the property by the collector under the authority conferred by the tax warrant under the statute, or by the statute itself directly. This is like the sale of the *rem* by the officer under the order or execution issued by the court. These, it must readily be seen, are essential to the exercise of the taxing power, and no revenue law could be of practical effect without them, and it may safely be said that every revenue law contains them. This *listing* is necessary, in order to describe and identify the property; the *assessing*, in order to ascertain its value; the *levy* in order to fix the proportion or rate of the tax; the *tax warrant* or statutory provision, in order to authorize some person to receive the taxes, and to sell in default of payment; and the *sale*, in order to contract the property to one who will pay the taxes due upon it. These are essential and jurisdictional, and every other provision of every revenue law may safely be said to be directory only, and not essential to the exercise of the taxing power. The legislature may prescribe the time or manner in which these essential and jurisdictional acts shall be done, but it cannot, either constitutionally or in the nature of things, provide for passing the title to property for the nonpayment of taxes without them. As to the time or manner in which they shall be done, the discretion of the legislature is absolute and supreme, and cannot be judicially controlled or interfered with. Having the right to prescribe the manner, it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end; or that no person shall question the legality of the manner; or that any subsequent act or fact shall be either *prima facie* or *conclusive* evidence that the law as to time or manner was complied with. In other words, the legislature being supreme, may prescribe the time and manner of doing the act, and may make that, or any other time or manner, which the persons doing it may adopt, legal and sufficient. But this power of the legislature extends only to those things over which it is supreme. As to the essential and jurisdictional facts, so to speak, which the legislature cannot annul or change, it cannot excuse the nonperformance of them, and, of course, cannot make the doing of any other thing a substitute for them or conclusive evidence of their being done. To restate the proposition succinctly: Whatever the legislature is at liberty to authorize or not, it may waive or estop denial; but not so as to that which it must require. It follows, therefore, upon principle, that it is not competent for the legislature to make the tax deed *conclusive* evidence of a compliance with the essential prerequisites we have above

the court decided that, under this statute, a party was not precluded from showing that the lands were not liable to taxation, or that, in fact, the lands had not been assessed for the year for the taxes of which they had been sold.[5] While a deed may not be conclusive evidence of the existence of jurisdictional matters, it may be of the manner in which jurisdictional powers have been exercised.[6] Thus, the deed cannot be made conclusive evidence of the *fact* of assessment.[7] It cannot be made conclusive evidence of the manner of the assessment, so as to obviate inaccuracy or indefiniteness in description upon the assessor's books, and identify the land which has been sold with that which has been assessed.[8] Under the Iowa statute, a tax deed is not conclusive evidence of the giving of proper notice for the expiration of the time for redemption.[9] A statute which declares that tax deeds which have been on record for two years prior to its passage shall be conclusive evidence of the regularity of the sale and of all proceedings prior to the execution of the deed, if it is not attacked within six months, is in effect a statute of limitations and is not in conflict with any provision of the Constitution of the United States.[1] As to the performance and regu-

named. That such an enactment is in conflict with the constitutional provision above quoted. That it deprives a man of his property without due process of law. Not that the exercise of the power of taxation is or is not due process of law; but that, in a suit between the tax purchaser, or his vendee, and the owner, which is a judicial investigation, 'due process of law' means a trial; and a trial involves the right of both parties to produce evidence. If one party only is allowed to produce evidence, and the other is estopped or concluded from producing his, such denial is effectually depriving him of his property without due process of law."

[5] Quivey v. Lawrence, 1 Idaho, 313.

[6] Martin v. Cole, 38 Iowa, 141.

[7] Immegart v. Gorgas, 41 Iowa, 439; Easton v. Savery, 44 Iowa, 654; Phelps v. Meade, 41 Iowa, 470; Nichols v. McGlathery, 43 Iowa, 189.

[8] Immegart v. Gorgas, 41 Iowa, 439.

[9] Reed v. Thompson, 56 Iowa, 455; Wilson v. Crafts, 56 Iowa, 450.

[1] Turner v. People, 145 N. Y. 451, 40 N. E. 400; S. C. 168 U. S. 90, 42 L. ed. 392; Saranac Land &

larity of all tax proceedings that are exclusively within the control of the legislature it may make a tax deed conclusive evidence, but not as to matters that are jurisdictional.[2]

§ 1423. **Illegal sale.**—And it is always competent to show fraud either on the part of the officer conducting the sale or on the part of the purchaser.[3] In Maine, the statute provided that, in an action involving the validity of a tax sale, the production of the tax deed in evidence, duly executed and recorded, should entitle the party to judgment, unless the contestant should prove payment or tender of the amount of the taxes and legal charges and interest thereon, and then he might be permitted to prosecute or defend. But the court said that "it could never have been the intention of the legislature to make a deed, which, upon its very face, shows the sale to have been illegal, evidence of title for any purpose. Such a deed does not prove, it disproves, the demandant's title, and shows that he is not entitled to prevail. It cannot be necessary for the adverse party to produce evidence to defeat the demandant's title, when, by his own showing, he has no title." [4]

§ 1424. **What title passes by tax deed.**—A tax deed if regularly made vests the title in the purchaser.[5] But a void

Lumber Co. v. Roberts, 177 U. S. 318, 44 L. ed. 786. But such statute does not cure jurisdictional defects in the proceedings: Meigs v. Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322.

[2] Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

[3] Butler v. Delano, 42 Iowa, 350.

[4] Allen v. Morse, 72 Me. 502. See, also, Wiggin v. Temple, 73 Me. 380; Orono v. Veazie, 57 Me. 517. See, also, as to the effect of various statutes, Bell v. Coats, 54 Miss. 538; Griffin v. Dogan, 48 Miss. 11; Virden v. Bowers, 55 Miss. 1; Cooke v. Pennington, 15 S. C. 185; Powers v. Penny, 59 Miss. 5; People v. Lansing, 55 Cal. 393; Morrill v. Douglass, 17 Kan. 291; Davis v. Vanarsdale, 59 Miss. 367; Mackall v. Canal Co., 94 U. S. 308, 24 L. ed. 161; Upton v. Kennedy, 36 Mich. 215.

[5] Board of Regents v. Linscott, 30 Kan. 241; Byington v. Stone, 51 Iowa, 317; Langley v. Chapin, 134 Mass. 82; Marin v New Orleans,

sale, of course, passes no title.[6] Where more land is conveyed than was assessed or advertised for taxes, the deed is not good as an effectual conveyance.[7] If it is necessary under the law to sell separate parcels of land separately, a tax deed which recites a sale of the lots in gross is void and passes no title.[8] A tax deed cuts off all prior liens and incumbrances.[9] If the statute directs the officer making the sale to sell the smallest quantity for which a purchaser will pay the tax and costs, a deed reciting that the premises were sold to the highest bidder is void and passes no title.[1] In some states the lien of the state for taxes is *in rem,* and if the land is in the possession of a life tenant, who has the legal duty of paying the taxes, a sale for nonpayment conveys the whole title and not the life estate merely.[2] A valid sale will deprive claimants to contingent remainders of their rights, as all persons interested should ascertain whether the taxes are paid or not.[3] In other jurisdictions the purchaser acquires the interest only of the person assessed.[4]

30 La. Ann. 293; Robbins v. Barron, 32 Mich. 36.

[6] Wyman v. Baer, 46 Mich. 418; Wallingford v. Fiske, 24 Me. 387; Johnson v. McIntire, 1 Bibb, 295; Sheehy v. Hinds, 27 Minn. 259; Allen v. Morse, 72 Me. 502; Brookings v. Woodin, 74 Me. 224; Shoat v. Walker, 6 Kan. 74; Waterson v. Devoe, 18 Kan. 223; Larkin v. Wilson, 28 Kan. 515; Sapp v. Morrill, 8 Kan. 682; Wadleigh v. Marathon County Bank, 58 Wis. 546; Hogelskamp v. Weeks, 37 Mich. 428; Nelson v. Goebel, 17 Mo. 161; Bender v. Stewart, 75 Ind. 89; Barton v. Gilchrist, 19 W. Va. 223; Ward v. Phillips, 89 N. C. 215; McGavock v. Pollack, 13 Neb. 535.

[7] Faith v. Casey, 2 Greene, 300.

[8] Boardman v. Bourne, 20 Iowa, 136. See Grimm v. O'Connell, 54

[9] Langley v. Chapin, 134 Mass. 82; Robbins v. Barron, 32 Mich. 36; Marin v. New Orleans, 30 La. Ann. 293.

[1] Carpenter v. Gann, 51 Cal. 193. Cal. 524.

[2] Cummings v. Cummings, 91 Fed. 602.

[3] Hazlip v. Nunnery, 29 So. 821.

[4] Graves v. Ewart, 99 Mo. 13, 11 S. W. 971; Anderson v. Post, 38 S. W. 283; Milner v. Shipley, 94 Mo. 106, 7 S. W. 175; Moore v. Woodruff, 146 Mo. 597, 48 S. W. 489.

CHAPTER XXXIX.

DEEDS ON EXECUTION SALE.

§ 1425. Prefatory section.
1426. Deeds of sheriff or constable.
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§ 1425. **Prefatory section.**—A discussion of the law of sheriff's deeds involves necessarily many cognate questions, as to the proceedings both before and after the execution of the deed. In a work on real property, an exhaustive treatment of such matters would manifestly be impracticable. In this chapter we have been contented with a brief discussion of the requisites of the sheriff's deed itself, and have refrained from entering the wide field of the law of executions. The following sections take up for consideration, then, the requisites of the deed, without discussing the steps leading up to the sale, or the subsequent rights of the parties.

§ 1426. **Deeds of sheriff or constable.**—When real property is sold on execution, the execution of a deed is generally essential to vest a complete title in the purchaser. "It is well settled that a sheriff's sale, of itself, although it may be manifested by a writing signed by the sheriff, does not pass the title of the debtor. To do this, a deed must be executed by the sheriff. This is clearly the case in this State,

as the statute law requires a deed to be made containing certain recitals; and until this deed is made no title passes. When the deed is made it relates back to the time of the sale, as to the debtor and his privies."[1] Prior to the execution of the deed the purchaser has merely a lien upon the land.[2] A deputy has power to execute the deed in the name of his principal;[3] but if made in the name of the deputy, the deed is void.[4] The validity of a deed requires a prior valid judgment and execution.[5] The certificate of sale may be assigned by the purchaser, and a deed be made to the assignee.[6] Although the purchaser may have paid on the day of the sale the amount bid by him, the sale

[1] Strain v. Murphy, 49 Mo. 337, 341, per Adams, J. See, also, Schermerhorn v. Merrill, 1 Barb. 511; Curtis v. Millard, 14 Iowa, 128; Barclay v. Plant, 50 Ala. 509; Childress v. Allin, 17 La. 37; Holmes v. McMaster, 1 Rich. Ch. 340; Edwards v. Miller, 4 Heisk. 314; Duprey v. Moran, 4 Cal. 196; Anthony v. Wessel, 9 Cal. 103; Spoor v. Phillips, 27 Ala. 193; Rogers v. Cawood, 1 Swan, 142; Crutsinger v. Catron, 10 Humph. 24; Doe v. Miller, 10 Up. Can. Q. B. 65; Doe v. Douston, 1 Barn & Ald. 230; Leger v. Doyle, 11 Rich. 109.

[2] People v. Mayhew, 26 Cal. 655. And see Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Smith v. Colvin, 17 Barb. 157; Kelly v. The Governor, 14 Ala. 541; Hayes v. N. Y. Min. Co., 2 Colo. 273. See as to right to oil coming from flowing wells between sale of land and the acknowledgment of the sheriff's deed, Hardenburg v. Beecher, 104 Pa. St. 20.

[3] Anderson v. Brown, 9 Ohio, 151; Jackson v. Bush, 10 Johns. 223; Glascow v. Smith, 1 Over. 144; Haines v. Lindsey, 4 Ohio, 88, 19 Am. Dec. 586; Kellar v. Blanchard, 21 La. Ann. 38; Young v. Smith, 10 Mon. B. 293; Evans v. Wilder, 7 Mo. 359; Carr v. Hunt, 14 Iowa, 206; Gorham v. Gale, 7 Cowen, 739; Sandford v. Roosa, 12 Johns. 162.

[4] Evans v. Wilder, 7 Mo. 359; Lewes v. Thompson, 3 Cal. 266; Parker v. Kett, 1 Salk. 96; Anderson v. Brown, 9 Ohio, 151. And see Cloud v. El Dorado Co., 12 Cal. 128; Robinson v. Hall, 33 Kan. 139; Mills v. Tukey, 22 Cal. 373; Tuttle v. Jackson, 6 Wend. 213.

[5] Leland v. Wilson, 34 Tex. 79; Watson v. Tindal, 24 Ga. 494.

[6] See Turner v. Madison Bank, 78 Ind. 19; Jamison v. Tudor, 3 Mon. B. 357; Maddux v. Watkins, 88 Ind. 74; McClure v. Engelhart, 17 Ill. 47; Conger v. Babcock, 87 Ind. 497; Blount v. Davis, 2 Dev. 19; Ehleringer v. Moriarty, 10 Iowa, 78; Splahn v. Gillespie, 48

is not consummated until the execution and delivery of the certificate of sale.[7] The real owner of the certificate of sale is not concluded by the statement of the grantee's assignor that he owns the certificate, but that it had been lost or mislaid.[8] The purchaser is not bound to pay the money bid until the sheriff has made and tendered him a deed.[9] Before a deed can be made the time for redemption must have elapsed.[1] A deed executed on the last day of redemption is void, because its execution is premature.[2] The presumption is that the officer making the sale took all the necessary steps required by law for a valid sale, and sold all that his levy gave him power to sell.[3] Where a purchaser at an execution sale has taken possession of the land, and held it continuously in his own right for the period of thirty-five years, it will be presumed that a sheriff's deed was executed.[4]

§ 1427. **Purchase by sheriff's agent.**—If the agent of the sheriff selling land on execution bids it off, with a tacit agreement that the sheriff is to pay for the land and obtain the title, without knowledge of the transaction by the judgment creditor, the sale, by a court of equity, may be declared to be void.[5]

§ 1428. **Growing crops.**—A purchaser at an execution sale is entitled to the growing crops. They are part of the

Ind. 397; McCrady v. Brisbane, 1 Nott & McC. 104; Bank of U. S. v. Voorhees, 1 McLean, 221; Testerman v. Poe, 2 Dev. & B. 103; Thompson v. McManama, 2 Disn. 213; Brooks v. Ratcliff, 11 Ired. 321; Green v. Clark, 31 Cal. 591; Frizzle v. Veach, 1 Dana, 212; Small v. Hodgen, 1 Litt. 16; Freeman on Executions, § 313.

[7] Kissinger v. Zieger, 138 Wis. 368, 120 N. W. 249.

[8] Bowman v. Davis, 39 Iowa, 398.

[9] State v. Lines, 4 Ind. 351.

[1] Delahy v. McConnell, 4 Scam. 157; Gorham v. Wing, 10 Mich. 486; Gross v. Fowler, 21 Cal. 392; Moore v. Martin, 38 Cal. 438; Bernal v. Gleim, 33 Cal. 668; Hall v. Yoell, 45 Cal. 584.

[2] Perham v. Kuper, 61 Cal. 331.

[3] Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 818.

[4] Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45.

[5] Downing v. Lyford, 57 Vt. 507.

realty.[6] But where the rights of tenants or others are involved, the purchaser can acquire no rights superior to those of the judgment debtor.[7] Where the property is covered by a mortgage the purchaser takes it subject to the mortgage.[8]

§ 1429. **When deed is executed.**—Where power is given to sell lands, the power to make a deed is implied.[9] The statute of limitations does not begin running against a purchaser until the delivery of the deed to him. It takes effect at that time, and a delivery is not made by its mere execution, and by information given by the sheriff to the grantee that the deed is ready for him.[1]

[6] Thomas v. Noel, 81 Ind. 382; Frost v. Render, 65 Ga. 15; Pelts v. Hendrix, 6 Ga. 452; Thweat v. Stamps, 67 Ala. 96; Ellithorpe v. Reidesil, 71 Iowa, 315, 32 N. W. 238; Nichols v. Dewey, 4 Allen, 386; Bloom v. Welsh, 27 N. J. L. 177; Frank v. Magee, 50 La. Ann. 1066, 23 So. 939; King v. Bosserman, 13 Pa. Super. Ct. 480; Loose v. Scharff, 6 Pa. Super. Ct. 480; Bear v. Bitzer, 16 Pa. St. 175, 55 Am. Dec. 490; Long v. Seavers, 103 Pa. St. 517.

[7] Dael v. Freeman, 92 N. C. 351; Blitch v. Lee, 115 Ga. 12, 41 Am. St. Rep. 275; Garrison v. Parker,

[8] Rahm v. Butterfield, 82 Ind. 163; McFadden v. Ross, 14 Ind. App. 312, 41 N. E. 607; Allen v. Phelps, 4 Cal. 256; Rust v. Electric Lighting Co., 124 Ala. 202, 27 So. 263; Lovelace v. Webb, 62 Ala. 271; McDonald v. Foster, 5 Ala. 664; Hitch v. Bailey, 115 Ga. 891, 42 S. E. 252; Tarver v. Ellison, 57 Ga. 54; Hubble v. Vaughan, 42 Mo. 138; State v.Cryts, 87 Mo. App. 440; Whitmore v. Tatum, 54 Ark. 457, 16 S. W. 198, 26 Am. St. Rep. 56; Hendryx v. Evans, 120 Iowa, 310; Bush v. Herring, 113 Iowa, 158, 84 N. W. 1036; Orr v. Broad, 52 Nebr. 490, 72 N. W. 850; Halyburton v. Greenlee, 72 N. C. 316; Anderson v. Holloman, 46 N. C. 169; Porter v. Parmley, 52 N. Y. 185: Snyder v. Stafford, 11 Paige, 71; Cole v. White, 26 Wend. 511; Erwin v. Blanks, 60 Tex. 583; Murrell v. Kelly-Goodfellow Shoe Co., 18 Tex. Civ. App. 114, 44 S. W. 27.

[9] Messerschmidt v. Baker, 22 Minn. 81.

[1] Jefferson v. Wendt, 51 Cal. 573. Generally it is considered that the title of the purchaser is incomplete until he has received a formal deed in pursuance of the sale: People v. Mayhew, 26 Cal. 655; Holmes v. McMaster, 1 Rich. Eq. (S. C.) 340; Curtis v. Millard, 14 Iowa, 128, 81 Am. Dec. 460; Barclay v. Plant, 50 Ala. 509; Leger v. Doyle, 11 Rich. (S. C.) 109, 70 Am. Dec. 240; Spoor v. Phillips, 27 Ala. 193; Robinson v. Garth, 6

§ 1429a. **Presumption of delivery.**—It may be presumed that a deed on execution sale was delivered from the fact that the officer making the sale gave it to the recorder, who took it to his office and recorded it, especially if the grantee took and held possession of the land sold, and the deed is in possession of his personal representative.[2] Until delivery of the deed, no title to the land sold passes.[3] The proper officer to execute the deed is the one in office at the time the certificate of sale under execution is produced and demand for the deed is made.[4] If the deed is executed, acknowledged and recorded, and the purchaser's title is decreed by the court to another, to whom the purchaser transfers his rights under the purchase, it is not necessary to make a formal delivery of the sheriff's deed, as a delivery in such a case will be presumed.[5]

§ 1430. **What the deed should contain.**—The deed ought to state the essential facts precedent to, and authorizing the sale.[6] But, unless required by statute, it seems that a deed is good without these recitals. Thus, it is held that the facts authorizing the officer to make the deed need not be recited, and, if defectively recited, the deed may be aided by

Ala. 204, 41 Am. Dec. 47; Strain v. Murphy, 49 Mo. 337; Crutsinger v. Catron, 10 Humph. 24. But in some States the deed has been held not to be necessary to perfect the purchaser's title, on the ground that its execution is a ministerial act: Boring v. Lemmon, 5 Har. & J.(Md.) 223; Leland v. Wilson, 34 Tex. 79; Remington v. Linthicum, 14 Pet. 84, 10 L. ed. 364.

[2] Lewis v. Watson, 98 Ala. 479, 22 L.R.A. 297, 39 Am. St. Rep. 82.

[3] Blodgett v. Perry, 97 Mo. 263, 10 Am. St. Rep. 307.

[4] Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836.

[5] Kane v. McCown, 55 Mo. 181.

[6] Wack v. Stevenson, 54 Mo. 485; Hihn v. Peck, 30 Cal. 288; Donahue v. McNulty, 24 Cal. 411; Byers v. Wheatley, 59 Tenn. 160; Taner v. Stone, 18 Mo. 580, 59 Am. Dec. 320; Wiseman v. McNulty, 25 Wis. 230; Wilhite v. Wilhite, 53 Mo. 71. And see Perkins v. Dibble, 10 Ohio, 433; Bettison v. Budd, 17 Ark. 546; Clark v. Sawyer, 48 Cal. 133; Carpenter v. King, 42 Mo. 219; Jordan v. Bradshaw, 17 Ark. 106, 65 Am. Dec. 419.

the return in the execution.[7] Nor need the deed show the court from which the execution issued.[8] So long as the authority existed, a mistake or variance in the recital of it does not vitiate the deed, and, generally, such variances and omissions will be disregarded.[9] A deed is not rendered void by a variance as to a recital of the interest of the defendant between the return of an execution and the sheriff's deed.[1] If the deed purports to convey the land of "Bertha J." Reynolds, while the recitals contained in it show that the execution ran against "Bertha" Reynolds, it is not inoperative because the identity of the person may be proven by evidence *aliunde*.[2] But where a judgment was rendered for "Maria H. Mathers," a deed reciting a rendition of a judgment for "Maria Mathers" is not admissible in ejectment by the grantee in the deed.[3] But misrecitals in a deed will not aid the execution defendant in an ejectment suit to defeat a recovery where it appears that the plaintiff has the right to receive a deed based on an execution sale and has received a deed from

[7] Welsh v. Joy, 13 Pick. 477.

[8] Hayward v. Cain, 110 Mass. 273.

[9] Holman v. Gill, 107 Ill. 467; Jackson v. Pratt, 10 Johns. 381; Strain v. Murphy, 49 Mo. 337; Cherry v. Woolard, 1 Ired. 438; Union Bank of Missouri v. McWharters, 52 Mo. 34; Buchanan v. Tracy, 45 Mo. 437; Jackson v. Jones, 9 Cowen, 182; Henley v. Branch Bank, 16 Ala. 552; Carmichael v. Strawn, 27 Ga. 341; Hattan v. Dew, 3 Murph. 360; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Matthews v. Thompson, 3 Ohio, 272; Saltonstall v. Riley, 28 Ala. 164, 65 Am. Dec. 334; Sneed v. Reardon, 1 Marsh. A. K. 217; McGuire v. Kouns, 7 Mon. 386, 18 Am. Dec. 187; Herrick v. Graves, 16 Wis. 157; Carpenter v. King, 42 Mo. 219; Driver v. Spence, 1 Ala. 540; Wilson v. Campbell, 33 Ala. 249, 70 Am. Dec. 586; Reid v. Heasley, 9 Dana, 324; Stow v. Steel, 45 Ill. 328; Hughes v. Dice, 1 Swan, 329. And see, also, Harrison v. Maxwell, 2 Nott. & McC. 347; Averill v. Wilson, 4 Barb. 180; Armstrong v. McCoy, 8 Ohio, 128, 31 Am. Dec. 435; Carter v. Spencer, 7 Ired. 14; Swift v. Agnes, 33 Wis. 228; Doe v. Rue, 4 Blackf. 263; Allen v. Sales, 56 Mo. 28.

[1] Davidson v. Kahn, 119 Ala. 364, 24 So. 583.

[2] Hill v. Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. St. Rep. 329.

[3] Robson v. Thomas, 55 Mo. 481.

the proper officer.[4] If the statute does not require the deed to state whether the land sold is free or subject to incumbrance, all that is necessary is to state that the sale is of all the debtor's title and interest in the land.[5] It is sufficient if the deed shows the substance of the execution without inserting a copy.[6] A recital in the deed of the acts of the officer in advertising and making the sale is evidence of the fact recited.[7] A recital that the officer had sent a notice to the judgment debtor by mail is sufficient to carry with it the inference that he prepaid the postage.[8]

§ 1431. **Illustrations.**—For instance, a sheriff's deed reciting a judgment against Smith & Haliburton, is not rendered invalid by the fact that the record shows a judgment against Jacob Smith and Wesley Haliburton.[9] In Texas, the court, after citing several cases, says: "These authorities establish the rule that a recital in the deed of the authority of the officer being an immaterial part of the conveyance, no mistake or misrecital can impair its legal validity or effect. There must be a subsisting judgment and execution under which the sale is to be made; but, as the recital of either is not material, so a mistake will not affect the title." [1] A clerical error in a sheriff's deed will not be regarded by a court of equity in adjusting equitable rights.[2] If everything else is regular, a misrecital in the dates will not vitiate the deed.[3] A misrecital in the execution of the date of the judgment, or an irregularity in issuing the execution, does not affect

[4] Armstead v. Jones, 71 Kan. 142, 80 Pac. 56.

[5] Frazee v. Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

[6] Ogden v. Walters, 12 Kan. 282.

[7] Cutting v. Harrington, 104 Me. 96, 71 Atl. 374.

[8] Cutting v. Harrington, 104 Me. 96, 71 Atl. 374.

[9] Union Bank of Missouri v. McWharters, 52 Mo. 34.

[1] Howard v. North, 5 Tex. 290, 312, 51 Am. Dec. 769.

[2] Stow v. Steel, 45 Ill. 328.

[3] Harlan v. Harlan, 14 Lea (Tenn.), 107.

the title of the purchaser.[4] Notwithstanding that the notice of sale has not been published for the requisite length of time, the sale, it is held, if confirmed by the court, confers upon the purchaser, in the absence of fraud, a good title.[5] But in Wisconsin, it seems, a purchaser cannot claim protection as a *bona fide* purchaser, if he buys at a sale made upon an insufficient notice; he is supposed to know the defect.[6] If a sheriff's deed is lost before registration, he may execute another.[7] The title does not pass until the deed is executed and delivered.[8] A misrecital of the execution, where authority to sell exists, does not affect the deed.[9] Notwithstanding an imperfection in the return, the recitals in a sheriff's deed are *prima facie* evidence of an execution sale.[1]

§ 1432. **Description.**—The deed, of course, must contain a description of the land conveyed, and the description must be of sufficient certainty to enable the land to be ascertained, else the deed is void.[2] A description of the land sold as two hundred and forty acres out of a tract containing

[4] Millis v. Lombard, 32 Minn. 259.

[5] Wyant v. Tuthill, 17 Neb. 495.

[6] Collins v. Smith, 57 Wis. 284.

[7] McMillan v. Edwards, 75 N. C. 81.

[8] Anthony v. Wessel, 9 Cal. 103.

[9] Wilson v. Madison, 55 Cal. 5; Blood v. Light, 38 Cal. 649.

[1] Miller v. Miller, 89 N. C. 402. The recitals in the deed as to the acts of the officer constitute *prima facie* evidence of the facts recited: Farrior v. Houston, 100 N. C. 369, 6 Am. St. Rep. 597. See, also, Owen v. Baker, 101 Mo. 407, 20 Am. St. Rep. 618.

[2] Lafferty v. Byers, 5 Ohio, 458; Jackson v. Rosevelt, 13 Johns. 97; Winkler v. Higgins, 9 Ohio St. 599; Edmonson v. Hooks, 11 Ired. 373; Boardman v. Reed, 6 Pet. 328, 8 L. ed. 415; Hannel v. Smith, 15 Ohio, 134; Deloach v. State Bank, 27 Ala. 437; Hughes v. Streeter, 24 Ill. 647, 76 Am. Dec. 777; McGary v. Dunn, 1 La. Ann. 338; Pound v. Pullen, 3 Yerg. 338; Landreaux v. Foley, 13 La. Ann. 114; Clarke v. Belmear, 1 Gill & J. 443; Throckmorton v. Moon, 10 Ohio, 42; Evans v. Ashley, 8 Mo. 177; Head v. James, 13 Wis. 641; Worthington v. Hylyer, 4 Mass. 196; Ronkendorff v. Taylor, 4 Peters, 349, 7 L. ed. 882; Thomas v. Turvey, 1 Har. & G. 435; Clemens v. Rannells, 34 Mo. 579; Freeman on Executions, §§ 281, 330.

two hundred and eighty acres, without other words to designate the land sold, renders the sale void for uncertainty in the description.[3] In a case in Minnesota, where a description in a certificate of sale was held to be too imperfect and incomplete to identify the property which was the subject of the sale, Mr. Justice Mitchell said: "It must be borne in mind that this certificate takes effect only as the execution of a statutory power, and hence should be construed with some strictness, so as to enable the purchaser to identify the land he is bidding on, and the owner to ascertain what to redeem. A description sufficient to convey land between man and man, or which, if contained in an agreement to convey, would authorize a decree of specific performance, might not be sufficient in proceedings to sell on an execution. When real estate is sold on legal process, it ought certainly to be described with sufficient certainty to enable a person of common understanding to identify it.[4] This is what the statute requires the notice of sale to contain, and certainly the certificate should contain as much. Looking at this as a practical question, and without refining on the technical distinctions between latent and patent ambiguities, it must be evident that this description would neither inform a purchaser what he was buying, nor the debtor what had been sold. It is palpably so imperfect and incomplete that the subject of the sale and conveyance could not be ascertained from it. If such a description were found in a conveyance between man and man, it is possible that it could be aided by evidence of extrinsic circumstances tending to show the intention of the parties. But in these proceedings the owner of the land intended nothing. The law, through its officers, was acting

[3] Deloach v. State Bank, 27 Ala. 437. In a deed the description was: "426⅔ acres of land out of the S. W. side of the C. N. Bassett survey, No. 229, of 640 acres in Brown county." The deed was held to be void for absence of a proper description: Bassett v. Sherrod (Tex. Civ. App., April 15, 1896), 35 S. W. Rep. 312.

[4] Citing Gen. Stats. 1878, c. 66, § 317.

in hostility to him, with a view to enforce collection of the judgments." [5] In a certificate of sale, a description fairly identifying the execution upon which the sale is based is sufficient; the court may, as in the case of deeds, disregard a false particular in such description.[6] Equity will correct a mistake in a sheriff's deed on foreclosure, where a part of the premises is omitted from the description, when a case of mistake is established.[7] A deed described the property as all the right, title, and interest of the person against whom the execution was issued, "of, in, and to the following described property, to wit: That certain tract and parcel of land and premises known as the 'Bull Head Rancho,' lying and being situate in Contra Costa county, of said State, and being a leasehold unexpired," and containing a description of a certain leasehold interest. The execution debtor at the time of the sale owned the fee. The court decided that the recital as to the leasehold interest did not act as a limitation upon the general terms of description preceding, but that the purchaser obtained the fee.[8] Where a sheriff's deed contains an accurate but general description, the land to be conveyed may be clearly located and defined by extrinsic evievidence.[9] Though the deed may not correctly describe the land, an equitable title will pass.[1] The levy is not vitiated by a description in a deed reciting that the levy was made on a tract off the S. end "on" 800 acres and instead of "of" 800 acres, and which mentioned the south side of the tract as the south end.[2] Although the deed described the land as the debt-

[5] In Herrick v. Ammerman, 32 Minn. 544, 547. In this case the description held to be incomplete and imperfect, in substance, was "lot 5, block 39, in the county of Morrison, and State of Minnesota," but the name of the village or city was not stated: Herrick v. Ammerman, 32 Minn. 544.

[6] Bartleson v. Thompson, 30 Minn. 161.

[7] Zingsem v. Kidd, 29 N. J. Eq. 516. And see Vanderbeck v. Perry, 28 N. J. Eq. 367.

[8] Dodge v. Walley, 22 Cal. 224.

[9] Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 818.

[1] Manning v. Kansas & C. Coal Co., 181 Mo. 359, 81 S. W. 140.

[2] Turner v. Crane, 19 Tex. Civ. App. 369, 47 S. W. 822.

or's right in 35 acres in a designated section, with no additional description, yet there is a sufficient identification when the fact that the debtor owned and levied on one tract containing that quantity of land and owned no other tract in that quarter section was notorious.[3] If the description calls for 60 feet front on a certain street and running back 140 feet, the 140 feet commence at the margin of the street, notwithstanding the rights of the debtor to the middle of the street are also included.[4] Although the description may be vague yet if the land is well known in the county by the description given in the deed, so that no one is misled, and no sacrifice of the property could be produced by the description, it will be sufficient.[5] But no title is conferred on the purchaser if the description in the deed fails particularly to describe the land.[6] A deed is not rendered void because the description fails to state the county in which the land is situated, when it recites that the levy was made by the sheriff of the county and the sale was made in such county.[7] The description will be sufficient if, with the assistance of extrinsic evidence, the land can be located and identified.[8] A sale is not vitiated because of the assessment of two adjoining tracts of land belonging to the same owner in the same district.[9] A title to a tract different from that described in the assessment roll can-

[3] Bank of Missouri v. Bates, 17 Mo. 583.

[4] Reeves v. Allen, 101 Tenn. 412, 47 S. W. 495.

[5] Shewalter v. Pirner, 55 Mo. 218.

[6] Veatch v. Gray, 41 Tex. Civ. App. 145, 91 S. W. 324.

[7] Turner v. Crane, 19 Tex. Civ. App. 369, 47 S. W. 822.

[8] Anderson v. Casey-Swasey Co., 120 S. W. 918. See for other cases involving sufficiency of description: Bank of Missouri v. Bates, 17 Mo. 583; Elwell v. New England Mort. Sec. Co., 101 Ga. 496, 28 S. E. 833; Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Reeves v. Allen, 101 Tenn. 412, 47 S. W. 495; Edrington v. Hermann, 97 Tex. 193, 77 S. W. 408; Watson v. McClane, 18 Tex. Civ. App. 212, 45 S. W. 176.

[9] Winning v. Eakin, 44 W. Va. 19, 28 S. E. 757; Muzum v. McEldowney, 46 W. Va. 207, 32 S. E. 1024.

not be conveyed under a judgment foreclosing a tax lien.[1] Where maps are recorded designated as "Assessor's Plat of C. S. Pierson's Addition to Pierson" and "Assessor's Subdivision" of a certain section at Pierson a description of the land as "Lot 1, Assessor's Pierson," there being no such plat as "Assessor's Pierson," is not sufficient on which to base a tax deed.[2] If the assessment is wholly void for failure to give a sufficient description, the certificate of sale will also be void.[3] A tax deed cannot be validated simply because of the prevalence of a custom for a number of years of entering lands on the tax books by descriptions which are incomplete.[4] If the township or range is not designated, the description is insufficient.[5]

§ 1433. **Acknowledgment.**—In some States an acknowledgment is an essential part of a sheriff's deed.[6] But generally the acknowledgment of a sheriff's deed is not essential to its validity, and hence, any defect in the certificate of acknowledgment can have no effect upon the deed.[7] The

[1] City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. Supp. 1035.

[2] Miller v. Lindstrom, 45 Fla. 473, 33 So. 521.

[3] Paine v. Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303.

[4] McWilliams v. Great Spirit Springs Co., 7 Kan. App. 210, 52 Pac. 905. See, also, as to sufficiency of description: Eberhart v. Nesbitt, 10 N. D. 103, 86 N. W. 117; Petit v. Flint & M. R. Co., 114 Mich. 362, 72 N. W. 238; Keho v. Auditor General, 138 Mich. 586, 101 N. W. 809.

[5] Sheets v. Paine, 10 N. D. 103, 86 N. W. 117.

[6] See Hall v. Benner, 1 Pen. & W. 402; McClure v. McClurg, 53 Mo. 173; Samuels v. Shelton, 48 Mo. 444; Ryan v. Carr, 46 Mo. 483; Murphy v. McCleary, 3 Yeates, 405; Adams v. Buchanan, 49 Mo. 64; Bellas v. McCarty, 10 Watts, 13; McCormick v. Meason, 1 Serg. & R. 92; De Haven's Appeal, 38 Pa. St. 373.

[7] In re Smith, 4 Nev. 254; Hutchinson v. Kelly, 5 Eng. 178; Doe v. Naylar, 2 Blackf. 32; Stephenson v. Thompson, 13 Ill. 186; Ogden v. Walters, 12 Kan. 291; Dixon v. Doe, 5 Blackf. 106. A sheriff may be compelled to execute a deed by *mandamus* (People v. Fleming, 2 N. Y. 484; People v. Irwin, 14 Cal. 428); or the purchaser may move in the original case (People v. Haskins, 7 Wend. 468); or proceed in equity; Withamv. Smith, 5 Grant Ch. 203.

language of the deed itself may be referred to for the purpose of supporting the certificate of acknowledgment.[8]

§ 1434. **Effect by relation.**—A deed takes effect by relation to the time of the original lien which has been merged in the sale on execution.[9] "The title acquired by the deed of the officer relates back to the date of the judgment lien, for the judgment is the source of his authority, and by such relation the last act is carried back to the first in making out the title, and takes priority as of the date of the first, which is the day of the judgment lien." [1] The title of the purchaser is not de-

[8] Owen v. Baker, 101 Mo. 407, 20 Am. St. Rep. 618.

[9] Million v. Riley, 1 Dana, 359; Clement v. Garland, 53 Me. 427; Wilhelm v. Humphries, 97 Ind. 520; Miller v. Wilson, 32 Me. 297; Brown v. Maine Bank, 11 Mass. 153; Fehley v. Barr, 66 Pa. St. 196; Bank of Pennsylvania v. Wise, 3 Watts, 394; Sharp v. Baird, 43 Cal. 577; Braddee v. Wiley, 10 Watts, 362; Hutchings v. Ebeler, 46 Cal. 557; Bank of Missouri v. Wells, 12 Mo. 361, 51 Am. Dec. 163; Bell v. Hall, 4 Greene G. 68; Cockey v. Milne, 16 Md. 200; Strain v. Murphy, 49 Mo. 337; Crowley v. Wallace, 12 Mo. 143; Jackson v. Ramsay, 3 Cow. 75; Shirk v. Wilson, 13 Ind. 129; Robinson v. Robinson, 3 Har. (Del.) 391; Hart v. Israel, 2 Browne (Pa.), 22; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Reichert v. McClure, 23 Ill. 516; Stephens v. Illinois M. F. Ins. Co., 43 Ill. 327; Smith v. Allen, 1 Blackf. 22; Parker v. Swan, 1 Humph. 80, 34 Am. Dec. 619; Howard v. Daniels, 2 N. H. 137; Kingman v. Glover, 3 Rich. 27, 45 Am. Dec. 756; Wood v. Turner, 7 Humph. 517; Richardson v. Thornton, 7 Jones, 458; Lackey v. Seibert, 23 Mo. 85; McClure v. Engelhart, 17 Ill. 47; Hall v. Hoxie, 3 Met. 251; Heywood v. Hildreth, 9 Mass. 393; McCormick v. McMurtrie, 4 Watts, 192; Jackson v. Dickerson, 15 Johns. 309, 8 Am. Dec. 236; Kane v. Mackin, 9 Smedes & M. 387; Bell v. Hall, 4 Greene G. 68; Kirk v. Vonberg, 34 Ill. 440; Miles v. Wilson, 3 Harris, 383; Doe v. Orn, 1 Ind. 363; Leach v. Kœnig, 55 Mo. 451; Shumate v. Reavis, 49 Mo. 333; Davidson v. Frew, 3 Dev. 3, 22 Am. Dec. 708; Pickett v. Pickett, 3 Dev. 6; Boyd v. Longworth, 11 Ohio, 235; Ellar v. Ray, 2 Hawks, 568; Winston v. Affalter, 49 Mo. 263. But see Bagley v. Ward, 37 Cal. 121; Davis v. Evans, 5 Ired. 525; Scheerer v. Stanley, 2 Rawle, 276; Pressnell v. Ransour, 8 Ired. 505; Hawk v. Stouch, 5 Serg. & R. 157; Swift v. Agnes, 33 Wis. 228; Thomas v. Connell, 5 Pa. St. 13.

[1] Hibberd v. Smith, 67 Cal. 547, 566, per Thornton, J.

pendent upon the return of the writ.[2] No presumption of fraud arises against a deed simply because it may be antedated to the time when the sale occurred.[3] The purchaser is also, from the day of sale, subject to the consequences of an adverse possession under color of title.[4] A deed executed to the holder of a certificate of sale was not sealed. When the omission was discovered, the successor to the sheriff who executed the first deed executed another deed in proper form. This second deed, it was decided, should relate back to the date of the first one, the grantee's right to receive a perfect title having accrued at that time.[5] In an action of ejectment against the defendant in execution, it is said: "It is not necessary for the plaintiff, who claims as a purchaser under the execution, to do more than show the judgment of a court of competent jurisdiction, the execution issued thereon, and the sheriff's deed. Upon proof of these things, the plaintiff makes out at least a *prima facie* case against the defendant."[6] Under a sale on foreclosure, the title of the party relates back to the date of the mortgage.[7]

[2] Blood v. Light, 38 Cal. 653; Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775; Hibberd v. Smith, 67 Cal. 547; Bray v. Marshall, 75 Mo. 327; Hunt v. Loucks, 38 Cal. 382; Wilson v. Madison, 55 Cal. 8. But see Walsh v. Anderson, 135 Mass. 65.

[3] Dobson v. Murphy, 1 Dev. & B. 586. See, also, on subject of relations, Testerman v. Poe, 2 Dev. & B. 103; Pressnell v. Ramsour, 8 Ired. 505; Cowles v. Coffey, 88 N. C. 340; Woodley v. Gilliam, 67 N. C. 237.

[4] Cowles v. Coffey, 88 N. C. 340.

[5] Kruse v. Wilson, 79 Ill. 233. A sheriff's deed relates back and takes effect as of the date of the sale: Wilson v. Spear, 68 Vt. 145; 34 Atl. Rep. 429.

[6] Los Angeles County Bank v. Raynor, 61 Cal. 145, 146, per McKee, J.

[7] Horn v. Jones, 28 Cal. 194; Vallejo Land Assn. v. Viera, 48 517; Stranklin v. Franklin Life Cal. 572. The deed relates back to the time of the lien: Stacy v. Holiday, 9 Ky. Law Rep. 517, 5 S. W. Ins. Co., 77 Ind. 268; Layne v. Layne, 28 Ky. Law Rep. 810, 90 S. W. 555; Merritt v. Richey, 127 Ind. 400, 27 N. E. 131; Chalfin v. Malone, 48 Ky. (9 B. Mon.) 496, 50 Am. Dec. 525; Greer v. Wintersmith, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613; Union Bank v. Manard, 51 Mo. 548.

§ 1435. **Worthless title.**—"A man who buys a worthless title at a sheriff's sale, and pays for it, or is allowed a credit on his lien, which is substantially the same thing, has no standing to repudiate the transaction subsequently." [8] "The rule in sheriff's sales is *caveat emptor*. The parties do not treat for a title, but the creditor proposes to sell, and the purchaser to buy, just whatever interest the debtor may have in the land." [9] If the purchaser, however, receives a deed which is invalid, he is entitled to another correct in form.[1] Said Mr. Justice Bliss: "When the first deed is defective, I infer the right to make an amended one from the duty of the sheriff to correct an imperfect or false return, and especially from his duty to make a perfect deed when the facts will warrant him in so doing. The latter, it is true, is seldom necessary; for if there be a valid judgment, execution, and sale, the deed must be very defective not to operate as a transfer of title. If a new deed is to be made, a motion to set aside the former one would be regular; for it would seem that when a statutory power is once exercised, the record shows on the part of the officer a full performance of his duty, and there is apparently nothing further for him to do. Its improper exercise will not, however, excuse him from such performance, and although it would be proper for the court in its control over the proceedings of its officers, before a new deed is made, to set aside an irregular or imperfect one, that confusion might not arise from the two conveyances, yet the last and correct deed is not void, and it cannot be impeached in this proceed-

[8] Wells v. Van Dyke, 106 Pa. St. 111, 115.

[9] Wells v. Van Dyke, 106 Pa. St. 111, 115. See, also, Weidler v. The Bank, 11 Serg. & R. 134; Boro v. Harris, 13 Lea (Tenn.), 36.

[1] Davis v. Evans, 5 Ired. 525; Adams v. Thomas, 6 Binn. 254; Doe v. Miller, 10 Up. Can. Q. B. 65; Thornton v. Miskimmon, 48 Mo. 219. See, also, Bartlett v. Judd, 21 N. Y. 200, 78 Am. Dec. 131; Bright v. Boyd, 1 Story, 486; Ware v. Johnson, 55 Mo. 500; Moreau v. Branham, 7 Mo. 351; Moreau v. Detchemendy, 18 Mo. 522; Johns v. De Rome, 5 Blackf. 421.

ing."[2] The defendant, in case there is a valid judgment and execution, is as much bound by the deed of a sheriff as if it had been made by the defendant himself.[3]

§ 1436. Title obtained by purchaser.—The sale can transfer only the title of the judgment defendant.[4] In Arkan-

[2] Thornton v. Miskimmon, 48 Mo. 219, 222.

[3] Blood v. Light, 38 Cal. 658; Ingersoll v. Truebody, 40 Cal. 611; Donohue v. McNulty, 24 Cal. 411; Dodge v. Walley, 22 Cal. 225; McDonald v. Badger, 23 Cal. 393; Jackson v. Danderheyden, 17 Johns. 167, 8 Am. Dec. 378; Pollard v. Cocke, 19 Ala. 188; Jackson v. Roberts, 7 Wend. 83; Smith v. Houston, 16 Ala. 111; Den v. Winans, 2 Green, 6; Cooper v. Galbraith, 3 Wash. C. C. 550; Love v. Powell, 5 Ala. 58. See as to strangers, French v. Edwards, 13 Wall. 506; Zabriskie v. Mead, 2 Nev. 285; Donohue v. McNulty, 24 Cal. 411.

[4] Carney v. Emmons, 9 Wis. 114; O'Neal v. Wilson, 21 Ala. 288; Rutherford v. Green, 2 Ired. Eq. 122; Pontiac Bank v. King, 110 Ill. 254; Stevens v. King, 21 Ala. 429; Treptow v. Buse, 10 Kan. 170; Emerson v. Sansome, 41 Cal. 552; Taylor v. Eckford, 11 Smedes & M. 21; Mansfield v. Gregory, 8 Neb. 432. By the sale the purchaser acquires only the right, title and interest of the judgment debtor in the property: Milwaukee, etc. R. Co. v. James, 6 Wall. 750, 18 L. ed. 854; Sweet v. Green, 1 Paige, 473, 19 Am. Dec. 442; Sands v. Hildreth, 14 Johns. 493; Snedeker v. Snedeker, 18 Hun. 355; Stonebridge v. Perkins, 141 N. Y. 1, 35 N. E. 980; Pool v. Cummings, 20 Ala. 563; Avent v. Read, 2 Port. 480, 27 Am. Dec. 663; Lawson v. Orear, 4 Ala. 156; v. Moody, 51 Ala. 473; Searcey v. Oates, 68 Ala. 111; Oliver v. Dougherty (1902), 68 Pac. 553; Tuley v. Ready, 27 Ark. 98; Dawson v. Parham, 55 Ark. 286, 18 S. W. 48; Bryan v. Sharp, 4 Cal. 349; Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561; Fore v. Manlove, 18 Cal. 436; Davis v. Mitchell, 34 Cal. 81; Le Roy v. Dunkerly, 54 Cal. 452; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Oglesby v. Hynds Mfg. Co., 96 Ga. 748, 22 S. E. 328; Andrews v. Murphy, 12 Ga. 431; Gitten v. Lowry, 15 Ga. 336; McLennan v. Graham, 106 Ga. 211, 32 S. E. 118; Ashley v. Cook, 109 Ga. 653, 35 S. E. 89; Vansyckle v. Richardson, 13 Ill. 171; Carbine v. Morris, 92 Ill. 555; Gould v. Hendrickson, 96 Ill. 599; Maghee v. Robinson, 98 Ill. 458; Dickerson v. Nelson, 4 Ind. 160; Bradshaw v. Warner, 54 Ind. 58; Sharpe v. Davis, 76 Ind. 17; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853; Curtis v. Millard, 14 Iowa, 128, 81 Am. Dec. 460; McCormick v. Williams, 54 Iowa, 50, 6 N. W. 138; Treptow v. Buse, 10 Kan. 170; Walker v. McKnight, 15 B. Mon. 467, 61 Am. Dec. 190; York v. East Jellico Coal Co., 25 Ky. L. Rep. 927, 76

sas, however, the purchaser of land at an execution sale on his own judgment takes subject to equities of which he has

S. W. 532; Murray v. Fishback, 5 B. Mon. 403; Wickliffe v. Bascom, 7 B. Mon. 681; Phillips v. Johnson, 14 B. Mon. 172; Bujac v. Mayhew, 3 Mart. 613; Ballio v. Poisset, 8 Mart. N. S. 336, 19 Am. Dec. 185; Bailly v. Percy, 14 La. 17; Denton v. Woods, 19 La. Ann. 356; Parish Bd. School Directors v. Edrington, 40 La. Ann. 633, 4 So. 574; Rollins v. Clay, 33 Me. 132; Symonds v. Hall, 37 Me. 354, 59 Am. Dec. 53; Coombs v. Gordan, 59 Me. 111; Balch v. Zentmeyer, 11 Gill. & J. 267; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Peabody v. Patten, 2 Pick. 517; Champney v. Smith, 15 Gray, 512; Dickinson v. Kinney, 5 Misc. 409; Baning v. Edes, 6 Minn. 402; Duke v. Clark, 58 Miss. 465; Taylor v. Eckford, 11 Sm. & M. 21; Harper v. Tapley, 35 Miss. 506; Adams v. Harris, 47 Miss. 144; Taylor v. Lowenstein, 50 Miss. 278; Bramlett v. Wetlin, 71 Miss. 902, 15 So. 934; Foster v. Potter, 37 Mo. 525; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Chumasero v. Vail, 3 Mont. 376; Hibbard v. Weil, 5 Nebr. 41; Mansfield v. Gregory, 8 Nebr. 432, 1 N. W. 382; Hart v. Beardsley (1903) 93 N. W. 423; True v. Congdon, 44 N. H. 48; Bryant v. Whitcher, 52 N. H. 158; Leport v. Todd, 32 N. J. L. 124; Islay v. Stewart, 20 N. C. 297; Dudley v. Cole, 21 N. C. 429; Flynn v. Williams, 23 N. C. 509; Rutherford v. Green, 37 N. C. 121; Reed v. Kinnaman, 43 N. C. 13; Giles v. Palmer, 49 N. C. 386, 69 Am. Dec. 756; Homesley v. Hogue, 49 N. C. 481; Walke v. Moody, 65 N. C. 599; Smith v. Smith, 72 N. C. 228; Wall v. Fairley, 77 N. C 105; Cannon v. Parker, 81 N. C. 320; Lee v. Citizens' Bank, 5 Ohio Dec. 21, 1 Am. L. Rep. 385; Gutshall v. Salsberry, Wright, 122; Green v. Cutright, Wright, 738; Barr v. Hatch, 3 Ohio, 527; McLouth v. Rathbone, 19 Ohio, 21; McCay v. Orr, 11 Wkly. Notes Cas. 524; Handley v. Connolly, 3 L. T. S. 201; Kerr v. Stiffey, 2 Penr. & W. 174; Reigle v. Seiger, 2 Penr. & W. 340; Reed's Appeal, 13 Pa. St. 476; Lodge v. Barnett, 46 Pa. St. 477; Pittsburg, etc. R. Co. v. Jones, 59 Pa. St. 433; Fehley v. Barr, 66 Pa. St. 196; Miller v. Baker, 166 Pa. St. 414, 31 Atl. 121, 45 Am. St. Rep. 680; Johnson v. Payne, 1 Hill, 111; Jones v. Burr, 5 Strobh. 147, 53 Am. Dec. 699; Pratt v. Phillips, 1 Sneed, 543, 60 Am. Dec. 162; Bostick v. Winton, 1 Sneed, 524; Arendale v. Morgan, 5 Sneed. 703; McCallum v. Woolsey, 6 Baxt. 308; Tobar v. Losano, 6 Tex. Civ. App. 698, 25 S. W. 973; Bates v. Bacon, 66 Tex. 348, 1 S. S. W. 256; Sullivan v. O'Neal, 66 Tex. 433, 1 S. W. 185; Smith v. Crosby, 86 Tex. 15, 23 S. W. 10, 40 Am St. Rep. 818; Griffith v. Fowler, 18 Vt. 390; Lull v. Matthews, 19 Vt. 322; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

either actual or constructive notice, but to no other.[5] A purchaser, unaware of a senior mortgage not discovered from the record because the initial letter of a middle name was omitted, acquires no equity superior to that possessed by the mortgagee.[6] The purchaser acquires the right to covenants passing with the land.[7] The interest of the purchaser is superior to that of junior lienholders;[8] but, of course, not to that of senior lienholders.[9] The purchaser's title cannot be affected by secret frauds or defects in the legal proceedings, resulting in the execution.[1] But he must have paid a valuable consid-

[5] Newman v. Davis, 24 Fed. Rep. 609.

[6] Clute v. Emmerich, 99 N. Y. 342; Boro v. Harris, 13 Lea (Tenn.) 36.

[7] White v. Whitney, 3 Met. 81; Sweet v. Green, 1 Paige, 473, 19 Am. Dec. 442; Redwine v. Brown, 10 Ga. 320; Lefort v. Todd, 32 N. J. L. 124; Carter v. Denman, 3 Zab. 260; McCrady v. Brisbane, 1 Nev. & M. 104; Lewis v. Cook, 13 Ired. 196; Kellogg v. Wood, 4 Paige, 578; Markland v. Crump, 1 Dev. & B. 94, 27 Am. Dec. 230. That the purchaser takes subject to the liens, easements, ansd equities to which the land was subject while the title was in the defendant, see Riddle v Bryan, 5 Ohio, 49; Miller v. Jamison, 24 N. J. Eq. 41; Corwin v. Benham, 2 Ohio St. 36; Taylor v. Lowenstein, 50 Miss. 278; Walke v. Moody, 65 N. C. 599; Richardson v. Stillinger, 12 Gill & J. 477; Blankenship v. Douglass, 26 Tex. 225; Polk v. Gallant, 2 Dev. & B. Eq. 395; Freeman v. Mebane, 2 Jones Eq. 44; Hart v. Felder, 4 Desaus. Eq. 202; Meade v. Thompson, Walk. Ch. 450; Boynton v. Winslow, 37 Pa. St. 315.

[8] Ex parte Elwood, 1 Denio, 633; Barden v. Brady, 37 Ga. 660; Willis v. Willis, 22 La. Ann. 447.

[9] Lathrop v. Brown, 23 Iowa, 40; Shotwell v. Murray, 1 Johns. Ch. 512; Littlefield v. Nichols, 42 Cal. 372; Bruce v. Vogel, 38 Mo. 100; Rankin v. Scott, 12 Wheat, 177, 6 L. ed. 592. See, also, Woodley v. Gilliam, 67 N. C. 237; Vickory v. Vickory, 1 Harris, 193, n.; Custer v. Detterer, 3 Watts & S. 28; Harrison v. McHenry, 9 Ga. 164; Commonwealth v. Alexander, 14 Serg. & R. 257; Duncan v. Reiff, 3 Pen. & W. 368.

[1] Mansfield v. Hoagland, 46 Ill. 359; Winston v. Otley, 25 Miss. 451; Stokes v. Geddes, 46 Cal. 17; Natchez v. Minor, 10 Smedes & M. 246; Drexel v. Man, 6 Watts & S. 343; Thorpe v. Beavans, 73 N. C. 241; Bull v. Sheredine, 1 Har. & J. 410; Mansfield v. Walsh, 36 Iowa, 534; Reeve v. Kennedy, 43 Cal. 643; Fetterman v. Murphy, 4 Watts, 424, 28 Am. Dec. 729; Beeson v. Beeson, 9 Pa. St. 289; Hamlin v. McCahill, Clarke Ch. 249;

eration to claim this right.[2] The purchaser at a sale to enforce a vendor's lien acquires the title of both vendor and vendee.[3] A person who has purchased under an agreement with the defendant to allow him to redeem, may be compelled to do so. He is considered a trustee.[4] As a general proposition, any error in the proceedings, or any irregularity will not affect the title of the purchaser, where he is not culpable. His title cannot be collaterally attacked.[5] An after-acquired title does

Williams v. Doran, 23 N. J. Eq. 385; Sowles v. Harvey, 20 Ind. 217. But this does not apply to the plaintiff or his attorney, as they will be assumed to have had notice: Stephens v. Dennison, 1 Or. 19; King v. Cushman, 41 Ill. 31; Bybee v. Ashby, 2 Gilm. 151, 43 Am. Dec. 47; Pettingill v. Moss, 3 Minn. 223, 74 Am. Dec. 747; Steinbach v. Leese, 27 Cal. 295; Barber v. Reynolds, 44 Cal. 520; Stewart v. Croes, 5 Gilm. 442; Raub v. Heath, 8 Blackf. 575; Winston v. Otley, 25 Miss. 451; Moody v. Harper, 38 Miss. 599; Harrison v. Doe, 2 Blackf. 1.

[2] Swayze v. Burke, 12 Peters, 11, 9 L. ed. 980; Jackson v. Summerville, 13 Pa. St. 359; Paul v. Fulton, 25 Mo. 156; Vattier v. Hinde, 7 Peters, 252, 8 L. ed. 675; Hutchins v. Chapman, 37 Tex. 612; Blight v. Banks, 6 Mon. 192; Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Losey v. Simpson, 3 Stockt. Ch. 246; Williams v. Hollingsworth, 1 Strob. Eq. 103; Jewett v. Palmer, 7 Johns. Ch. 65; Bush v. Bush, 3 Strob. Eq. 131; Lewis v. Phillips, 17 Ind. 108, 79 Am. Dec. 457; Wood v. Mann, 1 Sum. 506; Colquitt v. Thomas, 8 Ga. 258; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; Dugan v. Vattier, 3 Blackf. 245, 25 Am. Dec. 105. As to part payment and protection *pro tanto*, see Juvenal v. Jackson, 14 Pa. St. 519; Wells v. Morrow, 38 Ala. 125; Beck v. Uhrich, 13 Pa. St. 631, 53 Am. Dec. 507; Pickett v. Barron, 29 Barb. 505; Haughwout v. Murphy, 22 N. J. Eq. 531; Flagg v. Mann, 2 Sum. 487; Frost v. Beekman, 1 Johns. Ch. 288; Lewis v. Bradford, 10 Watts, 67.

[3] Vierheller's Appeal, 24 Pa. St. 106, 2 Am. Dec. 365; Zeigler's Appeal, 69 Pa. St. 471.

[4] Williams v. Williams, 8 Bush, 241; Lillard v. Casey, 2 Bibb. 459; Martin v. Martin, 16 Mon. B. 8; Arnold v. Cord, 16 Ind. 177; Green v. Ball, 4 Bush, 586; Dobson v. Erwin, 1 Dev. & B. 569; Denton v. McKenzie, 1 Desaus, Eq. 289; Strong v. Glasgow, 2 Murph. 289; Miller v. Antle, 2 Bush, 407; Combs v. Little, 3 Green Ch. 310; Langhorne v. Payne, 14 Mon. B. 624; Freeman on Executions, § 337.

[5] Moore v. Neil, 39 Ill. 256; Boles v. Johnson, 23 Cal. 226; Avery v. Rose, 4 Dev. 553; Wilkins v. Huse, 9 Ohio, 154; Reid v. Largent, 4 Jones, 454; Park v.

not pass to a purchaser at a sheriff's sale.[6] If, by reason of a failure to give a proper description of the land, a sale is invalid, the purchaser, it is held, is subrogated to the lien of the judgment.[7] By a sheriff's deed made under a foreclosure sale, the purchaser obtains whatever interest was created by the mortgage and vested in the mortgagee, and no greater interest.[8] Although the deed may be informal, yet, if made with authority, it passes title.[9] A purchaser cannot secure a valid title by the exercise of some falsehood or device by which he has been able to secure the property at a less sum than otherwise would have been obtained; but fraud must be proved.[1] One of the provisions of the statute in California is, that if an officer sells without notice prescribed by the statute, he is to forfeit five hundred dollars to the party aggreived, in addition to his actual damages. The question arose whether a purchaser at an execution sale without notice was an

Darling, 4 Cush. 197; Hewitt v. Weatherby, 57 Mo. 276; Pope v. Bradley, 3 Hawks, 16; Dingledine v. Hershmann, 53 Ill. 280; Warren v. Twilley, 10 Md. 39; Elliott v. Knott, 14 Md. 121; Jackson v. Rosevelt, 13 Johns. 97; Solomon v. Peters, 37 Ga. 251; Ogden v. Walters, 12 Kan. 282; Armstrong v. Jackson, 1 Blackf. 210, 12 Am. Dec. 225; Mordecai v. Speight, 3 Dev. 428, 24 Am. Dec. 266; Norton v. Quimby, 45 Mo. 388; Frakes v. Brown, 2 Blackf. 295; Cabell v. Grubbs, 48 Mo. 353; Die v. Meyers, 9 Up. Can. Q. B. 465; Dowdell v. Neal, 10 Ga. 148; Sullivan v. Hearnden, 11 Ga. 294; Bolgiano v. Cooke, 19 Md. 375; Oxley v. Mizle, 3 Murph. 250; Marshall v. Greenfield, 8 Gill. & J. 349; Manahan v. Sammon, 3 Md. 463; Rigg v. Cook, 4 Gilm. 336; Kelsey v. Dunlap, 7 Cal. 160; Dice v. Penn, 2 Swan, 561; Hendrick v. Davis, 27 Ga. 167, 73 Am. Dec. 726; Swiggert v. Kollock, 3 Houst. 326; Cooper v. Barrall, 10 Pa. St. 491; Hayden v. Dunlap, 3 Bibb. 216; Durham v. Heaton, 28 Ill. 264; Johnson v. Reese, 28 Ga. 353; O'Conner v. Youngblood, 16 Ala. 718; Knight v. Leak, 2 Dev. & B. 133.

[6] McMillan v. Richards, 9 Cal. 365; Kenyon v. Quinn, 41 Cal. 325; Westheimer v. Reed, 15 Neb. 662.

[7] Jones v. Smith, 55 Tex. 383. But see as to a sale under a void judgment, Grigsby v. Barr, 14 Bush, 330.

[8] Branham v. San Jose, 24 Cal. 585.

[9] Sherman v. McCarthy, 57 Cal. 507.

[1] Barton v. Hunter, 101 Pa. St. 406.

"aggrevied party," within the meaning of the section. The court decided that he was not. "Such a sale," said Mr. Justice McKee, "is either valid or invalid; it passes the title to the purchaser, or it does not. If it be a nullity and passes no title, the purchaser sustains no injury, and no right of action for the forfeiture accrues. Such an action is not maintainable, even by a party to the execution, unless he has been deprived of his property by a sale under it without notice; and if he has been deprived of his property by reason of the fact that it has passed from him by the sale to a purchaser at the sale, then the latter is not injured, for he has obtained what he bought." [2] Questions of this sort are confined to the officer who conducts the sale and the parties to the execution. If the purchaser dies before obtaining his deed, a deed subsequently made pursuant to the sale to the purchaser, though void, does not render the title of those claiming under him void.[3] If the deed is void, the officer may execute another one after the return day of the writ.[4] Generally the purchaser is entitled to the fixtures and improvements.[5] A purchaser to acquire the title of a person holding under a contract of purchase must show a compliance with the terms of the contract or an offer of performance.[6] Where a person who has loaned money and had a deed to the land makes an illegal sale

[2] Kelley v. Desmond, 63 Cal. 517, 518. See under the statute in Massachusetts, Sexton v. Nevers, 20 Pick. 451.

[3] Diamond v. Turner, 11 Wash. 189, 39 Pac. Rep. 379.

[4] Higigns v. Bordages (Tex. Civ. App., Oct. 18, 1894), 278 S. W. Rep. 350.

[5] Rounsaville v. Hazen, 39 Kan. 610, 18 Pac. 689; Wright v. Chestnut Hill Iron Ore Co., 45 Pa. St. 475; Pittsburg etc.. R. Co. v. Jones, 59 Pa. St. 433; Hayes v. New York Gold Min. Co., 2 Colo. 273; Polhman v. De Bouchel, 32 La. Ann. 689.

[6] Chase v. Cameron, 133 Cal. 231, 65 Pac. 460; Phillips v. Edmonson, 17 Mo. 579; Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099; Smith v. Lytle, 27 Minn. 184, 6 N. W. 625; Wilkerson v. Burr, 10 Ga. 117; McGuire v. Fabel, 25 Pa. St. 436; Morrison v. Funk, 23 Pa. St. 421; Pontiac Nat. Bank v. King, 110 Ill. 254; Carbine v. Morris, 92 Ill. 555; McKelvain v. Allen, 58 Tex. 383. See as to vendors lien: Pontiac Nat. Bank v.

under an execution against the person borrowing and enters into possession of the land, the borrower has a right to receive the rents and profits between the date of the illegal execution sale and a subsequent valid one. The resale will not be invalid if the amount received for rents and profits is insufficient to discharge the judgment.[7] The purchaser is also entitled to timber which had fallen at the date of the deed but which had not been converted into saw logs or rails.[8] If a building has been blown down by a tempest, the fragments pass to the purchaser as a part of the realty.[9]

§ 1437. Sale of interest of one defendant.—If on a joint judgment against two defendants, an execution is levied on the land as the property of one of them, and the sheriff sells and conveys the interest of such defendant, the purchaser will not acquire by the deed any interest possessed by the other defendant in the land.[1]

King, 110 Ill. 254; Lissa v. Posey, 64 Miss. 352, 1 So. 500; Twogood v. Stephens, 19 Iowa, 405; Cromwell v. Craft, 47 Miss. 44.

[7] Culver v. Lambert, 132 Ga. 296, 64 S. E. 82, 117 Ga. 537, 43 S. E. 849; Kesler v. Cornelison, 98 N. C. 383, 3 S. E. 839; Johnson v. Cook, 96 Mo. App. 442, 70 S. W. 756. See also Albin v. Reigel, 40 Ohio St. 339.

[8] Leidy v Proctor, 97 Pa. St. 486.

[9] Rogers v. Gilinger, 39 Pa. St. 185. This matter is more fully shown in the chapter on Fixtures. See §§ 1229 *ante*.

[1] Frederick v. The Missouri River etc. R. R. Co., 82 Mo. 402.

CHAPTER XL.

TORRENS SYSTEM.

§ 1438. Torrens system.
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1470. Certainty in location.
1471. Mechanics liens.
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§ 1438. Torrens system.—In several of the states acts have been passed for the determination of title to land under what is commonly known as the Torrens system, taking its name from Robert Torrens, who emigrated from Ireland to

South Australia in 1840, and who became the first premier of South Australia. While occupying the position of the collector of customs he conceived the idea of applying the principles applicable to the transfer of ships to land, and, finally, in 1858, South Australia adopted the system known by his name. Subsequently, the system was adopted in New Zealand, Queensland, New South Wales, Victoria, Tasmania, Western Australia, Fiji, British Columbia, Manitoba, England, Ireland, Hawaiian Islands, Philippine Islands, and in several of the states of the Union. The first acts in the United States were declared unconstitutional. But acts were subsequently passed which successfully withstood attack on constitutional grounds, and it may be asserted, in the light of the decisions to which we shall refer on a later page, that acts placing this system into operation can be drawn so as to be free from any constitutional objection, as it is a well recognized principle that a state has the power to provide for the adjudication of titles within its limits.[1]

[1] Speaking of land registration Mr. Niblack says: "For more than two hundred and fifty years the subject of registration of lands has been from time to time before the Parliament of England and has engaged the attention of the public writers of that country. An act was passed in the reign of Queen Elizabeth requiring sales of land to be enrolled in certain counties, but it was loosely drawn and became inoperative. In 1617 another act was passed, but it met with the same fate. In 1649 and 1651 bills were introduced, but were dropped. From that time on various bills were introduced. Some of these were passed by Parliament but few of them became effective. In England the great objections to registration has been the publicity which it gives to the condition of titles. The registries of the counties of York and Middlesex, established about 1708, are still in existence, but they have never been popular and have never been extended to other counties. All of the earlier bills and acts provided for the copying or abstracting of deeds, but in 1862, 'An Act to Facilitate the Proof of Title to and the Conveyance of Real Estate,' generally known as Lord Westbury's act, was passed. The object of this act was to register the title to land. It was an utter failure from the start, and afterward the land transfer act, 1875, commonly called Lord Cairn's act, was passed. This law was also for the

§ 1439. **Object of the system.**—The object of the system is, first, to secure by a decree of court, or other similar proceeding, a title which shall be impregnable against any attack, and, when this title is once determined, to provide that all subsequent transfers, incumbrances, or proceedings affecting the title shall be placed on a page of the register and marked on the memorial of title. A purchaser may accept this memorial as truly stating the title, and may disregard any claim not so appearing. In the states of this country adopting this system, the owner has the option of registering his land or he may proceed under the old system, but, the statute provides that, when a tract of land has once become registered, all transfers made subsequently shall be in compliance with the provisions of the statute. After the initial registration of the title, there is notice on the face of the certificate of registration of any matter affecting the title. The object is to secure the evidence of title exclusively by a certificate

registration of titles. It had a precarious existence for twenty-two years, when it was modified and supplemented by the land transfer act, 1897. During all these years land registration was freely discussed in periodicals, pamphlets and books, and there is a great amount of literature on the subject. 'Reasons against the Bill for County Registers' was written in 1653. 'Reasons and Proposals for a Registry or Remembrancer of all Deeds and Incumbrances of Real Estate to be had in every county, most necessary and advantageous, as well for Sellers and Borrowers, as Purchasers and Lenders. To the advance of credit, and the general good, without prejudice to any honest minded Person, most humbly offered to consideration,' by Nicholas Philpot, appeared in 1671. In 1694, Lord Chief Justice Hale wrote 'A Treatise, showing how useful, safe, reasonable and beneficial the Enrolling and Registering of all Conveyances of land may be to Inhabitants of this Kingdom.' The list of the publications on this subject, which have appeared since that time, is a long one. About twenty years ago there began some desultory discussion of changes in land registration in this country, but no active steps were taken in the matter until about ten years ago. Curiously enough, these steps were not in the direction of reforming the system which for so many years had been familiar to our jurisprudence, but they were toward a complete revolution in our ideas and laws." Niblack, Torrens System, p. 1.

issuing from public authority. In some statutes an indemnity fund is provided for the payment of any loss sustained by the operation of the system, and such an indemnity fund, while not found in some of the statutes, is an integral part of the system.[2]

[2] With reference to the different systems of transferring real estate Mr. Niblack says: "Three different systems of transferring real estate are used in the civilized world; transfer without recording or registering; the ministerial system of recording deeds, and the judicial system of registering titles. The first system is used in most of the counties of England where land is transferred by the production and delivery of all the title deeds, including one from the seller to the purchaser. This may seem to us a very crude system of dealing with land, but, under the laws, conditions and customs of that country, it has served its purpose so well that the agitation during the past two and one-half centuries for a change from it has not been able to bring about more than a partial abolition of the system. Under the law of primogeniture the eldest son inherits the real estate of a deceased person, and the title papers go with the land. Except for this fact, the system would be practicable. Until the last forty years land was scarcely considered a commercial article or commodity in England, and the comparative infrequency of transferring land helped to maintain this system. According to an estimate, made in the New Domesday book in 1871, there were only about two hundred thousand landed proprietors in England, and the most of these were opposed to any change which affected lands or their titles. Under the system which we are considering, a proprietor may borrow money on the security of his land by depositing his title papers with the lender who thereupon obtains an equitable lien on the land. This method of securing a loan is popular with both borrowers and lenders, since it is cheap, safe and secret. Such a system would not meet the necessities which arise from the laws of our own states, but without a thorough knowledge of the laws, customs and conditions in a foreign country, it is unwise either to condemn or to approve any system of transfer which has been estabished or has devolved in that country. The system of transcribing tide papers at length on the public records of the county where the land lies is the one in general use in this country. The recording system is capable of many modifications, and in some form it is in use In France, Scotland, Ireland, Belgium, Italy, Spain, Canada, Australia, the Republics of South America, parts of Switzerland, the counties of Middlesex and York in England, and in parts of Asia and Africa. In some of these countries there is established in the different

§ 1440. **Subsequent transfers.**—When title has been registered, the owner who desires to sell produces his original certificate, as he would the certificate of stock in a corpora-

districts an office in which all instruments of title must be in some manner recorded, while in others separate registries are provided for deeds and for mortgages. In many countries title papers are not copied in full, but when an executed instrument is presented to the proper officer, a mere memorandum of it is made on his records. In other countries a memorial is executed in a prescribed form when the instrument is executed, and this memorial is copied in the record. This record is not intended to show the contents or the effect of deeds, or to form a repository of secondary evidence of title. Its object is merely to give information of the existence of conveyances affecting real estate, which might otherwise be suppressed, and only such particulars as are necessary to identify the deed are intended to be placed on the register. The law of constructive notice is of course different in different countries, but in some countries registration of a deed is not in itself constructive notice.

In this country the primary and essential elements of the recording system are very simple. The patent from the government to the patentee is spread of record in the recorder's office in the county where the land is situated. From time to time as the land is sold and conveyed, the deeds are also copied on the records. When an owner of land, having his deed of record, desires to convey it to a purchaser, they may go together to the courthouse, examine the grantor and grantee indices to the lands lying in the county, and find in the recorder's office a perfect chain of title from the government to the then owner; they pass to the office of the clerk of the court and find that there are no judgments against the owner, and that no suits are pending which can affect the title to the land; in the office of the county treasurer they find that the taxes have been paid; the purchaser pays the consideration and receives his deed which is left with the recorder for record. As county officers are not overwhelmed with business and are possessed of reasonable political sagacity, they and their deputies lend a helping hand to the examination of the title, and the transaction is conducted and closed with ease, dispatch and even sociability.

The third system. The judicial system of registering titles is very broad and comprehensive. It embraces such registration of titles as was made in some continental countries two centuries or more ago. Some of its features are found today in the laws of Russia, Turkey, Norway, Mexico and other countries. But the distinctive features of registration of titles, as we now know them, are comparatively new. In the report of a commission appointed in England to inquire into the state of the law

tion, and the buyer may safely purchase on the faith of what the certificate shows. If a sale has been effected, the old certificate is surrendered and a new one received in its place. Under this system title to land is not conveyed by a deed,

of real property, published in 1830, some of these features were discussed briefly and in the most general way. This is the first hint of the scheme, which there is any record of in England. It was first adopted, however, in Australia as is shown by the following quotation:

'The boldest effort to grapple with the problem of simplification of title of land was made by Mr. (afterwards Sir Robert) Torrens, a layman, in South Australia, in 1857. When he was a commissioner of customs in that colony he had been struck by the comparative facility with which dealings in regard to transfers of undivided shares of ships were carried out under the system of registration provided in the Merchant Shipping Acts. Subsequently becoming a registrar of deeds, he became acquainted with the confusion and uncertainty inseparable from most questions of title to land. He devised a scheme of registration of title (as opposed to the old schemes of registration of deeds), modelled on the Merchant Shipping Acts, with such modifications as the different nature of the subject-matter demanded. After some opposition his scheme was passed through Parliament as the Real Property Act (No. 15 of 1857-58). Torrens himself carried it into operation, and more than 1,000 titles were registered during the first two years. The prospects of the system were so promising that the other colonies soon followed the example of South Australia. A similar act was passed in Queensland in 1861. In New South Wales, Victoria and Tasmania in 1862, in New Zealand in 1870, in Western Australia in 1874, and in Fiji in 1876.'

. . . There are many kinds of differences between Torrens laws, and this fact has lead some writers to speak of the acts which have been passed in this country as 'so-called Torrens laws.' The name of 'Torrens laws' when applied to the acts which have been passed or proposed in several states of this country, while by no means exact, is convenient to designate a set of laws which is framed to effect in a general way some of the main results of the original Torrens laws. All the acts which have been passed in this country may be embraced within what is commonly known as the Torrens system. The declared object of this system is under governmental authority to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its transfer.'

Niblack, Torrens System, p. 2.

as such, but only by the registration of the transfer, as in the case of the sale of the shares of stock in a corporation, and the deed, if made, is considered as nothing more than a contract between the parties by which the officer intrusted with the duty is authorized to make the transfer. As many times as a sale is made the old certificate is surrendered and a new one given in return. If a mortgage is executed, the transaction is noted on the certificate, and when it is paid its release is likewise noted. If a trust is created, proper indorsements are made; in a word, the object of the system is to make the certificate the complete repository of all that may affect the title as there is only one certificate of title on file at any time, which shows the state of the title, and to what extent, if any, it is affected by incumbrances.

§ 1441. **Illinois—First Torrens act unconstitutional.**—The first state to adopt the Torrens system of registration was Illinois.[8] The act which was recommended by a commission appointed by the Governor was adopted by the legis-

[8] "In 1891, the Illinois State Bar Association and the Chicago Real Estate Board approved resolutions favoring the passage of a joint resolution by the Thirty-seventh General Assembly the in session, authorizing the appointment of a commission to consider whether the Australian or Torrens system of registration of titles could be adapted to the constitution and laws of this State." Such joint resolution was adopted, and Governor Fifer appointed thereunder as such commission James K. Edsall, ex-Attorney General, as chairman and Theodore Sheldon, Willis G. Jackson, George W. Prince and Frank H. Jones. Upon the death of Mr. Edsall, the vacancy was filled by the appointment of Harvey B. Hurd. The report of the commission was made to the Governor December 10, 1892, and by him presented to the Thirty-eighth General Assmbly. Accompanying the report of the commission was the draft of a bill favored by the commission, and embodying the substantial features of the Australian and other colonial land acts so modified, it was thought, as to conform to the requirements of the federal and state constitutions. The bill failed to pass at that session, but received the approval of the next legislature, under the title of 'An Act Concerning Land Titles" approved June 13, 1895. In accordance with the provisions of

lature, but was declared to be unconstitutional on the ground that the provision authorizing the registrar to examine the facts in relation to the title and to issue a certificate of ownership was a delegation of judicial power within the prohibition of the constitution. It was insisted that his certificate would be in effect an adjudication that the person named in it was the owner in fee simple. On the other hand, it was contended that the act of the registrar was only ministerial and, though performed in the exercise of judgment and discretion, somewhat judicial in its nature, yet was not in violation of the constitutional provision. It was also contended that this provision of the statute was nothing more than a provision for starting the running of the statute of limitations. The court said that, conceding the proposition to be true: "It does not in our opinion follow that the proceeding before the registrar is not judicial in its character within the meaning of the constitution. Nor that the registrar and examiners, upon whose opinion the validity of A B's title is determined, are not clothed with judicial powers. Whether the principal thing to be determined by them be the ownership of the land, or merely whether it shall be brought under the provisions of the act, or only when the statute of limitations shall begin to run, it seems clear that the adjudication is based upon the rights of the parties claiming as owners, by construing and applying the law to the facts of the case." [4] The court said that in order to constitute an exercise of judicial power it was not

its *referendum* clause the act was adopted in Cook County, at a general election, held November 5, 1895. The law received the practically unanimous approval of the votes in that county 82,507 being cast in its favor; and only 5,308 against it. On February 10, 1896, the first certificate of title was issued by the registrar of titles, and a number of titles were brought under the act." Sheldon, land Registration pp. 1, 2.

[4] People v. Chase, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454, The opinion of the court was delivered by Mr. Justice Wilkin, who said. "As we understand the argument of counsel for appellee their position is that the proceeding before the registrar is not to determine the ownership of the lot,

necessary that there should be a conclusive adjudication between the parties as to their rights in issue but that when the officer is clothed with the power "of adjudicating upon

but simply to ascertain whether, under the existing facts, the lot shall be brought under the act, and that the determination of the ownership is merely incidental to the ministerial act of bringing the property into registration, and that the courts are left open to all parties claiming any interest adversely to the holder of the certificate of title. It is nevertheless true that the rights in the case stated of C D are substantially and conclusively affected by the decision that A B is the owner and entitled to have the lot brought under the act in question. It will not be denied that the issuing of the certificate puts in operation the statute of limitations against C. D. and that it, in effect, amounts to a determination that if his rights are not asserted in the courts within five years thereafter (unless within the provisions of sec. 38) he shall be forever barred. In other words, if it be true that the issue before the register is whether the property shall be registered, and whether the statute of limitations shall from that time begin to run, the decision of that question involves the determination of the ownership of the property; and if it be conceded that the courts are left open to C D for a period of five years from that date, the decision, nevertheless, takes away from him the existing right to bring his action without that restriction. The decision against him that the property shall be brought under the provisions of the act is as fatal to his right of ownership as though that question was finally and conclusively settled, except that he still has a limited time in which to have his title settled in a court of law or equity.

"In case of disability at the time the registrar issues his certificate, the right reserved to bring the action within five years may be of no benefit whatever. Section 37 expressly provides that 'it shall not be an exception to this rule (that is, that the requirement that the action must be brought within five years), that the person entitled to bring the action or make the entry is an infant, lunatic, or is under any disability, but action may be brought by such person by his next friend or guardian.' Let it be supposted, in the case put, that C D, at the time of the registration, is a child one year of age, without guardian, and of course, incapable himself of procuring the appointment of one. The registrar decides, and issues a certificate which starts the running of the statute of limitations against him. As to that fact his decision is conclusive. When the statute has run C D is six years of age, still without guardian and still incapable of procuring the appointment of one, incapable of knowing or protecting any of his rights, and yet, by the determination of the registrar that

and protecting the right or interest of contesting parties, and that adjudication involves the construction and application of the law, and affects any of the rights or interests of the par-

A B was the owner of the lot and entitled to a certificate of registration, his rights are absolutely and forever barred.

"How did the registrar arrive at the conclusion that A B was the owner of the property? Clearly by the examination of the facts, and by construing and applying the law to these facts, in doing which he adjudicated upon the rights and interests of A B and C D and decided in favor of A B against C D in a matter of most vital importance. It seems to us that the reading of this act forces the mind to the conclusion that it confers upon the registrar and his examiners judicial powers for the purpose of determining the rights of adverse parties. If, as is contended, the duties of the registrar are purely ministerial, why should he have been required to call to his assistance 'two or more competent attorneys' to be examiners of title as his legal advisers? Why, if his duties are merely ministerial, should he be limited in his right to bring the property within the provisions of the act to cases in which he should have the favorable opinion of at least two of those examiners? Manifestly, the act contemplates that he shall consider and apply the law to the facts presented by the applicant, and lest he should not be able to do so himself he is required to call to his aid those learned in the law. In the case supposed, whether the will was legally executed would, to a lawyer, be a simple question, but in its determination it would be necessary to understand and apply the provision of the statute; and whether by a proper construction of the instrument the devise was legally made to a particular person, every lawyer knows would often become a matter most difficult of solution.

"We are not unmindful of the well-settled rule that there are many cases in which ministerial officers exercise quasi-judicial powers or discretion, and yet the laws conferring such powers are held to be no violation of the constitutional provision under consideration. These cases are referred to and commented upon in Owners of Lands v. People, Stookey, supra, but what we have already said sufficiently distinguishes the powers conferred upon the registrar by this act from all such cases.

"It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified under the Constitution to exercise these powers, than is done by this law. This, doubtless, resulted from an attempt to adopt the provisions of a similar law in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction

ties, though not finally determining the right, it is still a judicial proceeding, or the exercise of judicial functions. The question, therefore, in the supposed case, is not whether the registrar finally determines the ownership of the lot, but whether his decision affects the rights of the parties claiming that ownership." [5]

§ 1442. **Illinois—Second Torrens act upheld.**—After the rendition of this decision a new act was passed which provided that the ownership should be determined by a decree in equity entered in a court of competent jurisdiction and that the registrar should issue the first certificate of registration upon the decree. The court held that the second act removed the fatal objection to the former act, because under the subsequent act the duties of the registrar were ministerial only. But the second act was also assailed on the ground that, as to subsequent registrations, it vested judicial power in the registrar in the performance of his duties. The court said that it might be admitted that the duties required of the registrar were judicial, but that it did not necessarily follow that the constitution prohibited this exercise to all except officers belonging to the judicial department. It held that the

exists against the legislative grant of such power upon nonjudicial officers.

"The powers of the registrar are no less judicial under our statute than those in the countries referred to. The only difference is there is no valid objection to the validity of the law, while here it is fatal. In Re, etc. ex rel. Bond, 6 Vict. L. Rep. (L) 458, construing 'the transfer of land statute' it is said: 'The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which, in law, as well as in fact, ought not to be registered in the first instance, and to determine the validity of the instruments as well as the priority of registration in point of time. He has therefore to discharge not merely ministerial, but judicial duties.'

"Without further discussion of the question we are of the opinion that this law for the reasons stated is obnoxious to the Constitution and therefore void."

[5] People v. Chase, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454.

mere fact that the act required the registrar to inquire into the existence of certain facts and to apply the law to them for the purpose of determining what his official conduct should be, or the fact that the action of the officer might affect private rights, did not, strictly speaking, constitute an exercise of similar power.

§ 1443. **Due process of law.**—Objection was also raised to the act that it permitted the taking of private property without due process of law because, it was urged, the act authorized judgment to be taken against a resident of the state upon merely constructive service. As to this objection, the court said that if the proper construction of the act was that it attempted to authorize judgment against a resident, notified only by publication, yet the law could be given practical effect by personal service upon residents, and in this event the whole law would not fail but only the particular provision. It was also objected that an owner, by the proceedings subsequent to the initial registration, might be deprived of his property without due process of law. On this point the court said: "It must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed, the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated, and modify the rules of evidence by which the title is to be determined. The true theory of this act, as we understand it, is that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing shall be determined in accordance with the rules now prescribed." This later act provided that any person who had any interest in the land, whether person-

ally served, notified by publication, or not served at all, must within two years after the entry of the decree, appear and file an answer and that, after the expiration of this term of two years, the decree, with certain exceptions, should be "forever binding and conclusive upon all persons." The court said that this provision seemed to be an attempt to make a decree binding upon persons not parties to the suit, and that to the extent to which it attempted to transfer property without due process of law could not be upheld. But "on all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding, and as to all who have merely a right of action, the expiration of two years may complete the bar." The court, said, however, that though the language of this section might be broad enough to amount to an attempt to transfer an estate by the land or by decree, it was possible to carry out the act without violating the constitution of that state in this respect. "Such objectionable features as those calling for construction," said the court, "must be left to future legislation, or determination by the courts in cases where the conflict is apparent and the question directly involved." The court declared that these provisions might be upheld as a limitation law.[6]

[6] People v. Simon, 176 Ill. 165, 44 L.R.A. 801, 52 N. E. 910, 68 Am. St. Rep. 175. A point was also made against the law that it provided that it should go into effect only after a favorable vote by counties. It was contended that this was an attempt to delegate legislative power. It was also insisted that the law was a special law and not a general law. The court held both these objections to be untenable. The court said as to other objections that they did not go to the validity of the entire law. "They involve," said the court," a construction of those sections, and can only be satisfactorily determined if cases shall arise involving their validity. It would be alike impracticable and unprofitable to attempt now to give a construction to every provision of this law. The question here is: Does the act violate the Constitution so far as to render it void, and therefore furnish no justification for the exercise of the respondent challenged? In the determination of that question every

§ 1444. **Ohio—Law held unconstitutional.**—In Ohio in 1896 an act entitled "An Act to provide for the Registration of Land Titles in the State of Ohio and facilitate the Transfer of Real Estate" was passed.[7] The constitutionality of this act was assailed on the grounds that it provided for cutting off of vested interests in property without due course of law; that it provided for the taking of private property for private purposes without the owner's consent; that it provided for the exercise of judicial power by the recorder; that it was a law of a general nature, but did not have a uniform operation throughout the state, and because it impaired the obligation of contracts. The act did not require the filing of a bill or petition as in the case of adversary parties, nor did it require a summons or process equivalent should issue from the court advising any persons who might claim an interest in the land that their interests were the subject of examination and adjudication. The notice was not required to name anyone claiming an adverse interest. The act required that the court should cause the applicant or some other competent person to serve each person named in the application, resident of the county, with a copy of the printed notice, but the act also provided that all persons named in the act, who resided without the county but within the state, should be served by sending copies of the notice to their addresses by mail, and it was required to serve only those named in the application even in this manner. Describing this feature, the court said: "One known to claim the title in fee simple adversely to the applicant need not be named in the application, nor receive a copy of the notice, though his place of residence may be within the county, and known. As to him, the only requirement is that he may have a chance to see a notice, signed by the applicant, addressed 'To whom it may concern,' containing a brief description of the land to be regis-

reasonable doubt must be resolved in favor of the validity of the law."

[7] 92 Ohio Laws, pp. 220–262.

tered, and published in any newspaper of general circulation within the county." The court said that this would be sufficient notice to those interested in the adjoining property, but as to those claiming an interest in the property it was not a sufficient notice of the pendency of a judicial proceeding in which their interest was to be the subject of adjudication and in which a decree might be entered binding them.[8]

[8] State v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 47 N. E. 551, 60 Am. St. Rep. 756. It was claimed that the notice was sufficient because the proceeding for the registration of the land was one *in rem*. On this point the court said: "Whether it is *in rem* or *in personam* is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem*, and thus invest the proceedings with that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effects of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit *quia timet* to settle title. It bears the least possible analogy to a proceeding *in rem*. The *res* is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and partakes, therefore, less of the nature of a proceeding *in rem* than does the foreclosure of a mortgage. The land is not a thing of shifting suits, like a ship, against which obligations may accrue to-day in one jurisdiction, and to-morrow in another. The status of the land is not changed by registration. The substantial thing determined by registration is that the person who makes the application has a right of property in the land, to the exclusion of all other persons. The judicial force of the proceeding is wholly expended in a conclusive determination of the rights of persons in the land. Except when the land is occupied by one who claims adversely to the applicant, the questions determined in registration are such as both before and since the adoption of the Constitution have been determined by courts of equity; and their decrees, much more distinctly than the judgments of courts of law, operate upon persons.

"To authorize a court to determine the adverse claims of parties touching their rights in things, judicial process is indispensable. Judicial process, in its largest sense, comprehends all the acts of the court, from the beginning of the proceeding to its end. In a narrower sense it is 'the means of compelling a defendant to appear in court, after suing out the original writ, in civil, and after indictment, in criminal, cases.' Bouvier. In every sense, it is the act of the

§ 1445. Judicial powers conferred upon recorder.—Another objection raised to the act was that it conferred judicial power upon the recorder. It was contended in the

court. This act does not contemplate process. The notice which it prescribes is the notice of the law of admiralty. The process required by the law of the land is the process of the common law. In Webster v. Reid, 52 U. S. 11 How. 437, 13 L. ed. 761, the court considered the validity of judgments rendered in proceedings under an act which attempted to authorize the quieting of titles in suits against defendants to be designated as 'owners of the half-breed lands lying in Lee county,' and notice to be given by publication. Justice McLean, in the opinion, said: 'These suits were not a proceeding *in rem* against the land, but *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attacked. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments therefore are nullities.' Brown v. Levee Comrs., 50 Miss. 471.

"That the legislature may provide for a substituted service of judicial process when it is required by necessity is not doubted. If, in a suit to adjudicate the rights of persons in property within the state, a defendant resides without the state, such necessity is apparent, for the process of the state has no efficacy beyond its borders. Other cases of necessity are recognized. The principle is that the state may provide for the adjudication of all adversary rights of persons in property within its borders, and, to the end that such jurisdiction may be complete, the legislature may provide a substituted service of process for cases in which actual service cannot be made. In such case nothing more is required by the law of the land than that the substituted service shall be such as, in the exercise of legislative discretion, shall be found most apt to accomplish the purposes of actual service. Shepherd v. Ware, 46 Minn. 174. Surely, these views will surprise no one who is familiar with the legislative history of the state.

"Section 55 of the Civil Code, enacted in 1853 is now in force as sec. 5035 of the Revised Statutes. It provides: 'A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.' The subsequent sections of the chapter relate to the service of the summons so required to be issued. Their provisions for a substituted or constructive service relate wholly to cases in which actual service is impracticable. In these respects the provisions of the Code continue the former practice pursued since the organization of the state. We

argument, that the powers conferred upon that officer were ministerial and not judicial. While the court admitted that the power to ascertain and determine, is not, of necessity, a judicial power and is often exercised by ministerial officers, and legislative bodies, yet, it held that, inasmuch as the receiver was to apply the evidence to facts in dispute, to apply the law to the fact and to determine who were *bona fide* purchasers, and finally to make an entry, that would, as to adversary rights, be equivalent to a decree in equity, he was in reality exercising judicial power in violation of the terms of the constitution.[9]

know of no instance prior to the passage of this act in which there was a departure from the views clearly stated by Judge Cooley, Const. Lim. (6th ed.) 452: 'In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law.' If it is borne in mind that the questions here considered concern the adversary rights of persons in property, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain, or the rights of taxation."

[9] State v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 47 N. E. 551, 60 Am. St. Rep. 756.

On the point that the act conferred judicial power upon the recorder the court said: "The principal powers conferred are to take proof after notice to the holder that a mortgage has been discharged, and, after a hearing, to enter a discharge upon the register; to make an entry that a lien has become inoperative in law by reason of limitation of time when application has been made therefor, the person interested notified, and he is satisfied that such is the fact; to correct memorials made or issued by mistake, if the rights of *bona fide* purchasers or lienholders for value have not intervened. It is true that the power to ascertain and decide is not necessarily a judicial power, and it is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. While it is

§ 1446. **Assurance fund in Ohio Act.**—With reference to the assurance fund which the act of Ohio provided, the court said that it was evident that the fund was to be raised

not supposed that any definition of judicial power, sufficient for all conceivable cases, has ever been attempted it is clear that 'to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.' Cooley, Const. Lim. 109. Recurring to the duties of the recorder under the act, he is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights, but he is to apply the rules of evidence to the ascertainment of disputed facts, to apply the rules of law concerning payment, to interpret and apply the statute of limitations as it may affect the enforcement of liens including such questions of disability as may arise, to decide the questions of law and fact that may arise in determining whether mistakes have intervened; and who are bona fide purchasers; and then to make an entry which is to have the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly, for there is a provision for appeal from decisions of the recorder. This is not supposed to include all the judicial powers which the act assumes to confer on the recorder, but it is sufficient for present purposes.

"Nor is this objection to the act avoided by the provisions which contemplate a review of or appeal from the action of the recorder. It would, perhaps, be found upon a careful consideration of his powers that they are not all embraced within the provisions for review or appeal. But the assumption that they are so embraced would not validate the act in this respect. The recorder, as a ministerial officer, is incompetent to receive a grant of judicial power from the legislature. His acts in the attempted exercise of such powers are necessarily nullities. They cannot be effective to impose any obligation or burden upon a citizen, or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision, or take upon himself the burden of an appeal. In view of the constitutional provision on the subject, he cannot be forced to this alternative. If these are judicial powers, it is admitted that they cannot be vested in the recorder. If they are not judicial, the provisions for an appeal are void, since as was said by this court in Ex parte Logan Branch at Logan of State Bank, 1 Ohio St. 432, 'we have no idea of an appeal except from one court

for the purpose of indemnifying those whose lands had been wrongfully taken from them, without due process of law. The court declared that the constitutional provision that private property should be held inviolate and should not be taken except for a public use, and only then on compensation being first made, was an inviolable assurance to all owners of property that they might retain them *in specie* unless they were required for a public use. The court considered that the plan for an assurance fund was also objectionable because if the owner's property should in fact be taken away from him there was no provision for compensation to be first made, but that recourse of the owner was to a subsequent action which he was required to commence and which was subject to a limitation. The court observed that an assured compensation to the owner was not provided, as he had no resort to any other fund than this and it might or might not be

to another.' An examination of People, Kern v. Chase, 165 Ill. 527, 36 L.R.A. 105, will show that in some of its aspects the act under consideration, though differing from the act passed by the legislature of Illinois to accomplish the same purpose, is within the principles upon which that act is held void.

"The views expressed touching the guaranties of the Bill of Rights are in accord with those of eminent lawyers who have considered methods for simplifying the records of titles, and diminishing the labors of searching them. The general system in the contemplation of this act has been thought impracticable, because questions of vested rights must remain open for want of due process. There have accordingly been recommended legislative enactments to shorten and simplify conveyances, to remove disabilities, to shorten the limitation of actions, to provide for general indexes for townships and wards or other small districts so as to restrict the area of search, and other like remedies operating prospectively, and having due regard to vested rights. However the general system proposed by this act may have operated where no system of registration previously existed, and the conserving influence of Constitutions are not enjoyed, it seems, in its prominent features, to be inapplicable where constitutional provisions, paramount to legislative enactments, protect vested rights, and restrict the state to the exercise of functions that are governmental in their nature." The Ohio Statute was subsequently repealed.

sufficient to compensate him in case his property was lost to him. It maintained that in so far as the lands are subject to a charge or contribution, payable through the recorder to the treasurer, they are taken by public authority without the owner's consent and for no public purpose. The court held that the purpose of the assurance fund to indemnify those whose land had been wrongfully taken from them, was not a public purpose. The court said that, taking into consideration the purposes for which government is instituted, and the high conception of private right prevailing when the constitution of the state was adopted, "it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes." [1] In Illinois the court declined to determine the validity of that portion of the act which created an indemnity fund and stated that in the view which it took of the case it was not necessary to consider the indemnity fund feature of the act, as the law in the opinion of the court could stand and accomplish its purposes without it.[2]

[1] State v. Guilbert, *supra*. Continuing on this point the court said: "The legislature may by law, authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation if its authority to conduct such business itself. The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions; and since the assuring of titles does not essentially differ from any other insurance nor, indeed, from any other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizens in every vocation."

[2] People v. Simon, 176 Ill. 165, 44 L.R.A. 801, 52 N. E. 910, 68 Am. St. Rep. 175.

§ 1447. **Comments of Supreme Court of Illinois on Ohio decision.**—The Supreme court of Illinois said that it agreed with the conclusion of the Supreme Court of Ohio that the act was unconstitutional, but what was said in argument in the Ohio case would not be adopted as applicable to the later Illinois statute. The court in Illinois, after speaking of the ground upon which the decision was based that in providing for the initial registration it attempted to give jurisdiction without service of summons, which was not that due process of law guaranteed by the constitution, declared: "On the other feature of the case, viz., as to what constitutes the exercise of judicial power, the opinion is not clear. In the reasoning on that point Judge Cooley's definition of judicial power is adopted, which we have seen does not serve to distinguish between such *quasi* judicial powers as may be properly exercised by executive or ministerial officers and those powers which belong solely to the judicial department." [3]

§ 1448. **Statutory provisions as to assurance fund.**—In the statute of Massachusetts it is provided that, "If the assurance fund at any time is not sufficient to meet the amount called for by such warrant of the governor, the treasurer shall make up the deficiency from any funds in the treasury not otherwise appropriated; and in such case any sums thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount paid on account of the deficiency shall have been made up." [4] The act of Massachusetts provides also that upon the original registration, and also upon the entry of a certificate showing title in heirs or devisees as registered owners, "There shall be paid to the recorder one tenth of one per cent of the assessed value of the real estate, on

[3] People v. Simon, 176 Ill. 165, 44 L.R.A. 801, 52 N. E. 910, 68 Am. St. Rep. 175.

[4] § 99 Mass. Stat.

the basis of the last assessment for municipal taxation, as an assurance fund." [5] Provision was made in the Ohio statute for the payment of "one tenth of one per cent of the value of such land as appraised for taxation, for the purpose of an assurance fund under this act." [6] In the statutes of Illinois and Oregon it is provided that when land is brought under the consideration of the act, and also upon the entry of a new certificate showing some one either by devise or by descent as registered owner there shall be paid to the registrar one tenth of one per cent of the value of such land. Such value to be ascertained by the registrar.[7] In Minnesota and Colorado, the statutes are similar to that of Massachusetts with the exception that instead of the payment being made on the basis of the last assessment for "municipal taxation," it is made on the basis of the last assessment for "general taxation." [8] In these last two mentioned states the statute provides that if there is an insufficiency in the assurance fund at any time "to pay any judgment in full, the balance unpaid shall draw interest at the legal rate of interest, and be paid with such interest out of the first funds coming into the fund." [9] But the provision in the statutes of Ohio, Oregon and Illinois is simply for the payment of losses out of the money that may be in the indemnity fund, without supplying any mode of payment if that fund should prove to be insufficient. The California statute does not make any provision for an assurance fund.[1]

[5] § 94, Mass. Stat.

[6] § 144, Ohio Stat.

[7] § 99, Ill. Stat. § 98 Oregon Stat.

[8] § 83 Minn. Stat; § 83 Colo. Stat.

[9] § 86 Minn. Stat.; § 86 Colo. Stat.

[1] In speaking of the various features for the creation of an assurance fund. Mr. Niblack says: "It will be noticed that, under the Ohio act, contribution to the assurance fund was levied but once, —when the land was first brought under the act; that under the Massachusetts, Minnesota and Colorado acts, it may be levied twice on the same land,—when it is first brought under the act, and again when the title to registered land is certified to be in the heirs or devisees of one who, at his death, was the

§ 1449. **Massachusetts—Torrens Act.**—In Massachusetts Governor Russell in his message to the legislature of February 17, 1891, brought to the attention of the legislature of that state the benefits to be realized by the adoption of the new system for the registration of land titles. An act was finally passed adopting this system and creating a court of registration.[2] This act, it was contended, was unconstitu-

registered owner, and that under the Illinois and Oregon acts it may be levied three times on the same land,—once when it is brought under the act, again when a tax deed of registered land is issued under a decree of the court which ordered the sale for the tax or assessment, and "also upon the entry of a new certificate showing some one either by devise or descent as the registered owner." It will also be noticed that the appraised value the levy is made on the basis of the of the land for taxation was the basis of contribution in Ohio; that last assessment for municipal taxation in Massachusetts, and on the basis of the last assessment for general taxation in Minnesota and Colorado, and that the basis of the contribution in Illinois and Oregon is the value of the land as ascertained by the register. Under the act in the latter states, the registrar is clothed with a power similar to that of an assessor. He is not required to view the premises, but may ascertain their value in any manner he may deem proper." Niblack, Torrens System, p. 59.

[2] Mass. Stats. 1898, chap. 562. In his message to the legislature, Governor Russell said: "In my inaugural address I referred to the fact that the subject of a thorough reform in our system of land registration and transfer would be brought before you, and commended the matter to your serious consideration. Since that time public-spirited citizens of various business organizations have been manifesting an interest in this question, and through the press and otherwise it is coming prominently before the people for discussion. In view of the great benefit which I believe can be realized by the adoption of the new methods, I deem it proper to bring the matter specially and prominently to your attention.

"I believe that the Australian system of land registration and transfer, more commonly referred to, from the name of its originator, as the Torrens system, is the longest step that has yet been taken anywhere towards that freedom, security and cheapness of land transfer which is conceded to be so desirable in the interest of the people. . . .

"The need of some new system of land transfer is shown by the growing public dissatisfaction caused by the delays and the expense attending our present system of registration of deeds. That system has existed in this Commonwealth for a little more than two hundred and forty years. In

tional on the ground that the original registration deprived all persons except the registered owner of any interest in the land without due process of law, and also on the ground that,

former days, when our population was smaller, it apparently satisfied the popular demand; but, with increase of population, it has become less servicable. Our people are now largely concentrated in cities and populous towns. The last national census shows that forty-seven cities and towns, having each more than eight thousand inhabitants, contain seventy per cent. of our whole population. The density of the population, with the greater subdivision of land and increase of real estate transactions which it involves, is reflected in the mass of the records in our registries of deeds. . . .

"The first point which should be noted in connection with the Torrens system is that its use is optional and not compulsory; existing methods of transfer can be continued precisely as at present. . . . .

"The contrasts between our present system of registration of deeds and the Torrens system of registration of titles are very marked. Under our system title to land depends not only upon instruments recorded in the registry of deeds, but also upon facts and proceedings which lie outside of those records. There is a constant increase in the mass of records of deeds and of proceedings affecting titles to land, which makes the work of examination a constantly growing burden. If any man's title to a piece of land is questioned or attacked by any particular person the Commonwealth has provided courts with appropriate jurisdiction in which the owner can have his rights ascertained and established as against that person. But it has failed to provide any method by which one can have his title ascertained and established as against all the world. . . .

"Under the Torrens system an official examination of title is substituted for an unofficial one, and the result when once sufficiently ascertained is given conclusive effect in favor of the owner, and his title is made perfect against all the world. In effect, under the Torrens system, the State provides a proper court in which any one can have his rights in relation to a piece of land declared and established, not only as against particular persons who may have an adverse interest upon special notice to them, but also as against everybody. The principle of basing decrees upon general notice to all persons interested already prevails in our probate law. Laws providing for the removal of clouds upon title to land, after general notice to all unknown defendants, exist in many States of the Union, and the validity of decrees made under such laws has been established by decisions of the Supreme Court of the United States.

"The contrasts in practical effect between the two systems are, therefore, very great. Under the

after the original registration, judicial power was conferred upon the recorder. Subject to a few exceptions, the act provided that the decree of registration should bind the land and quiet the title thereto and should be "conclusive upon and against all persons." The objection was urged that there was no sufficient notice to persons having adverse claims or process against them, in a proceeding intended to bar their possible rights. Speaking of the provisions of the act, the court observed that if it did not satisfy the constitution "a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claims—indeed, certainty against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service

system of registration of deeds, we have needless expense from repeated re-examinations, loss from delays, and possible insecurity arising from the fact that title depends not only upon the records, but also upon facts outside of the records and not disclosed by them. Under the Torrens system, the title is examined once for all, and there is no needless re-examination; as all subsequent acts and proceedings must be brought one by one to the register to be noted, the state of the title can be ascertained at any time by simple inspection of the certificate on record. . . .

"The convenience and relief afforded by this new system to all who borrow upon mortgage will be very great. The facility of raising money easily and cheaply upon landed security is of great consequence to the prosperity and development of a community. By abolishing the tax formerly imposed upon mortgages, our State has already relieved borrowers of one unjust and oppressive burden, to the great advantage of the public, and the additional step now proposed will confer further benefit in the same direction. The power of readily pledging real estate will also prove of great importance to the business community. At present the delays involved in an examination of title often prevent a business man from obtaining a needed advance to meet a sudden stringency in the money market. At times when loans are contracted and credit is shaken it would be of great benefit to business if all the real estate of the community, possessing, as it does, greater stability of value than anything else, could be as immediately available as a means of raising money as stock of goods or other personal property." Sheldon, Land Registration, p. 117.

upon the claimant." The court referred to the Ohio decision stating that it seemed to be the impression of that court,[3] that such a judicial proceeding is impossible in this country, and observed: "But we cannot bring ourselves to doubt that the constitutions of the United States and of Massachusetts, at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world, and destroy all manner of outstanding claims, without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case." [4]

[3] See State v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 47 N. E. 551, 60 Am. St. Rep. 756.

[4] Tyler v. Judges of the Court of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812. Mr. Justice Holmes who delivered the opinion of the court said: "The prohibition in the 14th Amendment of the Constitution of the United States against a State depriving any person of his property without due process of law; and that in the 12th article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined criteria of justification, which may be found in ancient practice (Murray v. Hoboken Land & Improv. Co., 18 How. 272, 277, 15 L. ed. 372, 375); or which may be found in convenience and substantial justice, although the form is new (Hurtado v. California, 110 U. S. 516, 528, 531, 28 L. ed. 232, 236, 237, 4 Sup. Ct. Rep. 111, 292; Holden v. Hardy, 169 U. S. 366, 388, 389, 42 L. ed. 780, 789, 790, 18 Sup. Ct. Rep. 383). The prohibitions must be taken largely with a regard to substance, rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before. Hurtado v. California, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292. Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem*, dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it, and not encounter any provision of either Constitution. Jurisdiction is secured by the power of the court over the *res*. As we have said, such a proceeding would be impossible were this not so; for it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is to bar all. Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. ed. 565, 570; The Mary, 9 Cranch, 126, 144, 3 L. ed. 678, 684; Mankin v.

§ 1450. Wisdom of legislature not to be criticised.—The court declared that "Such an act should not be upheld without anxiety," but added that "The difference in degree

Chandler, 2 Brock. 125, 127, Fed. Cas. No. 9,030; Brown v. Levee Comrs., 50 Miss. 468, 481; 2 Freem. Judgm. 4th ed. secs. 606, 611. In Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, a judgment of escheat was held conclusive upon persons notified only by advertisement, to all persons interested. It is true that the statute under consideration required the petition to name all known claimants, and personal service to be made on those so named. But that did the plaintiffs no good, as they were not named. So, a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. And in this case, as in that of escheat, just cited, the conclusive effect of the decree is not put upon the ground that the state has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*. Bonnemort v. Gil, 167 Mass. 338, 340, 45 N. E. 768. See (Hamilton v. Brown) 161 U. S. 263, 274, 40 L. ed. 695, 699, 16 Sup. Ct. Rep. 585. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary.

Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. In Arndt v. Griggs, 134 U. S. 316, 327, 33 L. ed. 918, 922, 10 Sup. Ct. Rep. 557, 561, it is said to be established that a 'State has power, by statute, to provide for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication.' In Hamilton v. Brown, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585, 592, it was declared to be within the power of a State 'to provide for determining and quieting the title to real estate within the limits of the State, and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons.' I doubt whether the court will not take the further step, when necessary, and declare the power of the States to do the same thing after notice by publication alone. See Huling v. Kaw Valley R. & Improv. Co., 130 U. S. 559, 564, 32 L. ed. 1045, 1048, 9 Sup. Ct. Rep. 603; Parker v. Overman, 18 How. 137, 140, 141, 15 L. ed. 318, 319. But in the present case provision is made for notice to all known claimants by the recorder, who is to mail a copy of the published notice to every person named therein whose address is known. Section 32. We shall state in a moment one reason for thinking this form of notice constitutional." See further, Cook v. Allen, 2 Mass. 462, 469, 470; Dascomb v. Davis,

between the case as bar and one in which the constitutionality of the act would be unquestionable seems to us too small to warrant a distinction. If the statute is within the power of the legislature, it is not for us to criticise the wisdom or expediency of what the legislature has done." The court also said that the act was not objectionable as conferring judicial power upon the recorder.[5]

§ 1451. In the Supreme Court of the United States.— The case arising in Massachusetts was brought by a writ of error to the Supreme Court of the United States, but that court dismissed the writ, holding that the objection to the validity of the act could not be raised, so as to give jurisdiction to the Supreme Court of the United States, by a person who was not injuriously affected by the provisions of the act complained of. Mr. Chief Justice Fuller, with whom concurred three other justices, dissented, maintaining that the court had jurisdiction because it had been ruled in the state court that the petition was sufficient to raise the federal question, that the petitioner was competent to raise the question and that if his contention was well-founded, he was entitled to preventive relief. These rulings, the minority held, were sufficient for jurisdiction.[6] The majority opinion held that, as the object of all litigation is to establish a right or to sustain a defense, a party is bound to show an interest in the suit personal to himself. Under this view it probably will be impossible to obtain from the Supreme Court of the United States a declaration as to the constitutionality of statutes establishing the Torrens system of registration, until some concrete case shall arise in which a party has lost by the opera-

5 Met. 335, 340; Brock v. Old Colony R. Co., 146 Mass. 194, 195, 15 N. E. 515."

[5] Tyler v. Judges of the Court of Registration, *supra*.

[6] Tyler v. Judges of the Court of Registration, 179 U. S. 405, 45 L. ed. 252.

tion of the statute some property right protected or claimed to be protected by the Constitution of the United States.

§ 1452. Minnesota—Statute upheld.—In 1901 in Minnesota an act was passed providing for the Torrens system of registering land titles. The act applied only to counties containing more than 75,000 inhabitants, and registration is optional with the owner. Objections were raised to the act on the grounds that it was special legislation, because the classification adopted by the legislature was an arbitrary one; that it contemplated the taking of property without due process of law, that it conferred upon the courts the power of appointing examiners of titles; and that the office of examiner is a county office, which, under the constitution of that state, it was claimed, must be filled by popular election. On the contention that property might be taken without due process of law the court said that the proceeding was practically one *in rem* and that the courts had power to clear and quiet titles by their decrees. The court referred to the Ohio decision and observed that: "The provisions of the statute passed upon in that case as to notice to all persons having any possible interest in the land were not as full as they are in our statute." All the other objections to the act were declared untenable, and the act was held to be constitutional.[7]

[7] State v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 N. W. 175, 89 Am. St. Rep. 571. On the point of taking property without due process of law the court speaking through Mr. Chief Justice Start said: "Actions and proceedings to conclusively establish rights and titles against all claimants and parties, known and unknown, are not novelties in our jurisprudence, for decrees probating wills, distributing estates of deceased persons, quieting title to real estate against unknown heirs and unknown parties, have been repeatedly held to be conclusive on the whole world. It is now the settled doctrine of this court that the district courts of this State may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all of the known claimants within the jurisdiction of

§ 1453. Colorado—Statute upheld.—In 1903 Colorado

the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto. The proceeding provided for by the act in question is such a one. It is substantialy one *in rem* the subject matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for the serving the summons and giving notice of the pendency of the proceeding are full and complete, and satisfy both the State and Federal Constitutions. To hold otherwise would be to hold that the courts of this State cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. That the courts of this State have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this State. Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773; Inglee v. Welles, 53 Minn. 197, 55 N. W. 117; McClymond v. Noble, 84 Minn. 320, 87 N. W. 838. See also Mayall, 63 Minn. 511, 65 N. W. 942, and Mathews v. Lightner, 85 Minn. 337, 88 N. W. 992.

"It is further claimed by the relator that the provision of the act which limits the exercise of the right to a party not actually served with process or notified of the proceeding to apply to the court to open the decree and permit him to answer to sixty days after the entry of the decree, and that no proceeding shall be had for the recovery of the land after that time, is unconstitutional. It is urged in this connection that the legislature cannot require a person in the unchallenged possession of land to commence an action or institute any proceeding within a limited time to vindicate his claim, or be barred of all rights in the premises. This is true. Baker v. Kelley, 11 Minn. 480, Gil. 358. But it is equally true that when a party so in possession is by a summons served as in civil actions, and thereby notified that the land he occupies is claimed by another, and that he is required to appear in court and defend against the claim, he must do so, or be conclusively barred by the judgment entered in the proceeding. Now, as already suggested, all persons in possession of the land must be made parties to the proceeding to secure the registration of the title thereto, and the summons must be served upon them. If the act is complied with, it is extremely improbable that an adverse claimant in actual possession of the land would fail of receiving notice of the pendency of the proceeding to register the title. However this may be, it is reasonably clear, and we so hold, that the particular provision of the act, which, in effect, forbids the commencement or the defense, in opposition to the decree, of any action

adopted the Torrens system.[8] Objections were made to the constitutionality of this act on practically the same grounds as those urged against similar acts in other states. The title of the act was "An act concerning land titles." The court held that the generality of the title was no objection to it, and that it was not obnoxious to the constitutional provision requiring an act clearly to state its subject. Objection was made to the act that its procedure did not constitute due process of law, but this objection was held to be without merit. The court followed the reasoning in the Minnesota,[9] and Massachusett's [1] cases, and held that the act was not open to the objections urged against it, but was constitutional.[2]

or proceeding to recover the land brought more than sixty days after the entry of the decree, does not apply to an adverse claimant in the actual possession of the land, upon whom the summons is not served; for, being in possession, he cannot bring such an action, and his right to defend his possession and title in such a case cannot be made to depend upon his nonaction. So construed, the provision of the act both as to the opening of the decree and as to the commencement of any action or proceeding to recover the land in opposition to the decree, is valid as a statute of limitations. The time limit seems to us to be a short one, but, in view of the complete and far-reaching provisions of the act for notice to all parties, and the fact that the right of appeal as in civil actions is given, we cannot hold that the legislature arbitrarily exercised its discretion in fixing the limit. State v. Messenger, 27 Minn. 119, 6 N. W. 457; Russell v. H. C. Akeley Lumber Co., 45 Minn. 376, 48 N. W. 3; London v. N. W. American Mortg. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 777; Henningsen v. Stillwater, 81 Minn. 215, 83 N. W. 983. Our conclusion, then, is that the act is not unconstitutional in that it deprives parties of their interest in land without due process of law. Similar statutes providing for the Torrens system of registration have been sustained against a like objection by the courts of other States in carefully considered opinions. Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 52 N. E. 910."

[8] Sess. Laws Colo. 1903, pp. 311–352, c. 139.

[9] State v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 N. W. 175, 89 Am. St. Rep. 571.

[1] Tyler v. Judges Court of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

[2] People v. Crissman, 41 Colo. 450, 92 Pac. 949.

§ 1454. **California—Statute upheld.**—In 1897, a statute, recommended by a commission, appointed for the purpose of examining into the merits of the Torrens system, was passed under the title of "An act for the certification of land titles, and the simplification of the transfer of real estate." In 1907 this act came before the Supreme Court for review. The court held that full control was possessed by the state over the mode of transferring and establishing titles to property within its boundaries. To enable this to be accomplished the state possesses power to establish the status of the land and to declare the nature of the titles and interests in it, and to determine in whom such interests are vested. The argument was also made that judicial power can be exercised only for the purpose of settling actual disputes and controversies, and that if the title is undisputed, the act of describing and declaring it is purely administrative and cannot be performed by the judicial department of the government. But the court said that this argument did not fully meet the case. "It may be admitted," said the court, "that the existence of controversies which could not be settled by the interested parties, and the necessity of some other means of determining such controversies, were the primal causes for the institution of courts with power to adjudge between the parties to the strife, and, consequently, that originally the exercise of judicial power implied the existence of an actual present controversy to be determined. But the refinements of civilized life, and the necessity for the orderly regulation, determination, and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing securety against disputes and claims which may arise. Hence, in modern times the power of the courts may be, and often is, exerted to protect property and right from possible, though at the time unknown, hostile claims and pretensions, or to merely declare a *status,* or right and thereby to forestall and

prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings." The court adopted the views expressed in the decisions in Illinois, Minnesota and Massachusetts, and said that they "fully supported the conclusion that the act in question does not deprive persons of property without due process of law, nor withhold from them the equal protection of law." [3] An act, having similar features, for establishing and quieting the title to land, commonly called the McEnerney act, passed for the purpose of providing a method by which the owners in possession of property, the record title to which was destroyed by the burning of the public records, might secure a decree which should supply a publicly authenticated title, was held constitutional and as not depriving any person of property without due process of law.[4] The constitutionality of this act was also upheld by the Supreme Court of the United States. Mr. Chief Justice White in delivering the opinion of the court said: "To argue that the provisions of the statute are repugnant to the due process clause, because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings, is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." [5]

§ 1455. **In other states.**—In 1907 a commission was appointed by Governor Hughes of New York to investigate the operation of the Torrens system and the advantages to be

[3] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

[4] Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A. (N.S.) 682, 88 Pac. 356. See also Hoffman v. Superior Court, 151 Cal. 386, reiterating the principle announced.

[5] The American Land Co. v. Zeiss, No. 230, decided January 3, 1911, October Term, 1910.

obtained by its use, and the majority report of that commission,—the commission standing four to three,—was in 1908 enacted into a statute.[6] The statute provides that any person

[6] N. Y. Laws 1908, ch. 444.

Speaking of the systems prevailing in other countries for the registration of titles to land, Mr. Niblack says: "In 1722, a law was passed in Prussia which was a step in the direction of registration of titles, as we now understand that system. Similar laws were passed in Baden in 1809, in Saxony in 1843, and in the minor German speaking States in several succeeding years. In 1811, a judicial system of registration was recognized by law in Austria, and in 1871, this law was amplified and extended to any State which might desire to adopt it.

In 1891, the German government passed a law for vesting in registered owners absolute and indefeasible titles, subject, however, to the rectification of errors in all cases except as against *bona fide* purchasers for value. The registration of titles in Germany is made with reference to, and has a direct connection with, the system of land tax registers and maps called cadasters. Registration is compulsory, and the land is divided into districts with a local tribunal of the first instance in each: When notice to register the land in one of of these districts is given, each owner must apply for registration, and the whole district is brought under the law at one time. Boundaries are ascertained, and, as a part of the proceeding, the land tax registries are perfected.

In 1885, the French Parliament granted to Tunis a land registry act. Under it, every owner of land may apply for registration or not, as he chooses. Three months' notice is given, and during this time the French magistrate ascertains the boundaries of the land which is to be brought under the operation of the law. After the official report on the application has been published, two months' time is given for objections. The tribunal of seven magistrates then decides on the application and the record of the title is entered. The registration is conclusive evidence of the state of the title, and anyone who has been injured by it must resort to the indemnity fund which is raised by a contribution of one per cent of the value of the property registered.

In Canton of Vaud in Switzerland, a law was passed in 1882 for the registration of land titles. Another law was passed in the same year governing the land tax registers and maps, which are similar to the German cadasters. It is evident that the two laws had in view the better evidence of the ownership and value of lands. The expenses of proceedings under both laws are paid out of the *ad valorem* tax on the sales of land. Registration under this law is compulsory, and is similar to that in Germany.

As may readily be supposed, the Torrens laws of the provinces of

claiming an interest in the land may file a cautionary notice, and by such filing it becomes necessary to make him a party to any proceeding instituted for the registration of title. All

Canada are for the most part copied from the laws of England and Australia. They differ in detail and in practical application in the different provinces, but it is not necessary to consider them definitely in these pages.

The acts in the different provinces of Australasia need not be separately dealt with. They are framed along the same lines and differ only in detail. A general statement of the contents of one of the acts is entirely sufficient for present purposes, and the leading features of the Victorian land transfer act of 1890 are given in the synopsis which follows. This act is specially referred to because it is the work of much labor and consideration, and contains the best and most approved provisions and features of all the prior acts and amendments in the provinces of Australasia.

Office of Titles. The Attorney General administers the Titles Office and is assisted by a number of officials, the chief of whom is the Commissioner of Titles. The powers of the latter officer are very extensive, and he performs judicial functions. There is a registrar who has large duties and powers, and there are examiners of titles, one of whom is the chief examiner, assistant registrars, sworn valuators and surveyors. The foregoing officers, together with the subordinate officials appointed by the Governor-in-Council to assist in carrying out the provisions of the act, form the official staff of the Office of Titles.

Who may register. Any person claiming to be the owner in fee simple of the land, or having the power of appointing or disposing of the land, or trustees with a power of a sale of the fee simple, or a guardian or conservator, may apply for registration of the title. Consent of interested persons is required in some cases, as in case of a trustee, or the owner of a first estate of freehold. A mortgagor must obtain the consent of the holder of the mortgage to the application.

Certificate of Title. The application is referred by the registrar to an examiner of titles, who reports on the title, and submits the report with all the papers to the commissioner. If the report is satisfactory, the commissioner directs the registrar to bring the land under the operation of the act forthwith, by registering a certificate of title.

If the title is not satisfactory, certain proceedings may be had. Every certificate of title is in duplicate; the original is bound in the register book, and the duplicate original is given to the proprietor of the land. The certificate, when issued, is, except in case of fraud, conclusive evidence of title; and no irregularity or informality in the application, or in the proceedings previous to registration, ren-

interested persons are made parties, but the statute declares that "the question of the sufficiency of the proof that all such owners and claimants who could be found by diligent in-

ders it impeachable or defeasible. In case a duplicate certificate has been lost or destroyed, a special certificate should be issued.

Transfer of Land. A proprietor of registered land may transfer it by will, or by a prescribed form of transfer, signed by him and his transferee, which states that being the owner of the land described in his certificate of registration, giving the number, he transfers it to his transferee, naming him. When this transfer is registered, and the certificate referred to is surrendered, a new certificate is issued to the transferee. . . .

treated as a feme sole. The proprietor of registered land may mortgage it by signing a mortgage in the prescribed form. This form states that he has borrowed of the mortgagee a certain sum of money, and that he has covenanted with him to repay the principal sum on a certain day, with interest in the meantime at a certain rate, payable semi-annually; to insure against fire in the name of the mortgagee, and to keep any special covenants which may be inserted in the instrument. It then states that he mortgages the land to secure the payment of the debt. It is dated and is signed by both parties. When this instrument is registered it operates as a security, but not as a transfer of the land. . . .

Caveat. Any person claiming an interest in the land may lodge a caveat with the registrar in a prescribed form, forbiding the registration of any person as transferee, or the registration of any instrument affecting the title, until after notice to the caveator.

Abstract and search certificate. The registrar, upon the application of any proprietor of land under the operation of the act, shall issue to him a registration abstract, enabling him to transfer or otherwise deal with his estate or interest in such land at any place without the limits of Victoria, and any person desiring information as to whether a proprietor is able to deal with the land described in his certificate, free from obstruction known to the registrar, but not appearing upon the certificate, may sign an application for a search certificate in a prescribed form; and, on payment of the required fee, the registrar shall cause the necessary searches and inquiries to be made for the purpose of affording the information required. A person proposing to deal with a proprietor may obtain from him, or his agent, a consent to a stay of registration for forty eight hours from the time mentioned in a search certificate. The order for this stay is entered on the register and a copy is given to the applicant by the registrar. If within this stated time the instrument effecting the proposed dealing is lodged for registration, it takes precedence over any other

quiry are duly and specifically named and made parties to the action shall be for the court; its decision that such proof is sufficient shall be shown by its making the order for the service of the summons and the commencement of the action as prescribed in this act, and such decision or order shall not be drawn in question after six months from the time when the final judgment in the action is entered." The statute also provides that before the court shall make an order for the service of the summons and notice by publication or other

instrument lodged after the time mentioned in the search certificate.

Survey. On any application for registration, the commissioner may require a survey by a licensed surveyor. He may adjust boundaries and where there is an excess of land in any subdivided block, he may apportion it between the different owners of lots. He may determine doubtful boundaries of old subdivisions and prepare a scheme of re-subdivision. The expense in the first instance is paid out of general funds, but is collected from lot owners as they apply for registration, or for new certificates. . . . .

Recitified certificate. A registered proprietor may apply to have the description of the land in his certificate amended. Where the application affects land described in other certificates of other proprietors, special notice must be given to them. On the granting of the application all the certificates may be rectified.

Commissioner and registrar. The special powers and duties of the commissioner and registrar are set out at length. Whenever any question arises with regard to the performance of any duty or the exercise of any function conferred or imposed by the act, either on him, or on the registrar, the commissioner may state a case for the opinion of the Supreme Court. Its judgment on the question is binding on both officers.

Assurance fund. Contributions to the assurance fund are paid to the treasurer of Victoria. This fund with its accumulations is vested in Victorian Government Securities. It is an indemnity fund, and the government is an insurer of titles, which undertakes, in consideration of certain payments, to make good any loss, according to the terms of the law. Any person sustaining loss through any mistakes or misfeasance of any registrar, or other officer, or clerk, in the execution of duties under the act, or through any error, commission or misdescription in any certificate, or entry in the register, may in certain cases bring an action for the recovery of damages against the registrar as nominal defendant, and in case of recovery be paid from this fund." Niblack Torrens System, p. 8.

form of substituted service, it "must be satisfied by proof of the facts that the plaintiff has been or will be unable with due diligence to make personal service of the summons. The question of the sufficiency of such proof shall be for the court, and an allegation in an affidavit or other duly verified statement recited in said order, that the plaintiff has been or will be unable with due diligence to make personal service of the summons, or that after diligent inquiry a defendant remains unknown to the plaintiff or that the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state may be taken to be sufficient proof thereof. An order containing such a recital, and made on such proof shall not be drawn in question after six months from the time when the final judgment in the action is entered." [7] This State of Washington has also provided by a statute enacted in 1907 that titles may be registered under the Torrens system.[8] Similar statutes have been enacted in Manitoba,[9] in the Hawaiian Islands[1] and in the Phillippine Islands,[2] and gererally in the Australian colonies.

§ 1456. **An action in rem.**—A proceeding to register a title under the Torrens system is a proceeding *in rem,* or perhaps more accurately speaking, is analogous to a proceeding *in rem.* Speaking of the Massachusetts statute, Mr. Chief Justice Knowlton said that "an application for the registration of a title is, by the terms of the statute, a proceeding *in rem,* which operates directly to vest and establish title to the land. The statute contains elaborate provisions for the determination of rights which shall be binding upon all the world." [3] Full power is possessed by a State to control the

[7] N. Y. Laws 1908, ch. 444, §§ 15, 17.

[8] Wash. Sess. Laws, 1907, p. 693.

[9] Rev. St. Manitoba, 1902, vol. 2, c. 148.

[1] Hawaii Rev. Laws, 1905, c. 154.

[2] 8 Acts Phillipine Com. No. 496.

[3] First Nat. Bank of Woburn v. City of Woburn, 192 Mass. 220, 78 N. E. 307. See, also, Tyler v. Judges Court of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E.

mode of transferring and establishing titles to property situated within its domain, and the state may provide a special proceeding, in the nature of a proceeding *in rem* for the purpose of determining the status of the land. In this proceeding it is competent for the tribunal clothed with jurisdiction to ascertain and adjudge the nature of the titles and interests in the land, and the persons in whom they are vested. This power is inherent in the State, and may be exercised whenever the legislative power deems it proper to exercise it.[4]

812; State v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 N. W. 175; Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 96 N. W. 704; Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

[4] Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. In Ardnt v. Griggs, 134 U. S. 321, 33 L. ed. 918, 10 Sup. Ct. 357, where the court held that a State had power to provide a means for determining the title to real estate, as against nonresidents, who were brought into court only by publication. Mr. Justice Brewer in delivering the opinion of the court said: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is: What jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a State has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a

§ 1457. Effect of fraud.—In many of the statutes putting the Torrens system into force, provisions are made for the protection of the owner or one possessing an interest where the decree has been obtained by fraud. In the statute of South Australia the title of the registered owner is not absolute in case of fraud.[5] In that statute it is provided that the title of such owner shall be indefeasible except in case of fraud and in that case any person defrauded shall have all rights and remedies that he would have had if the land had not been placed under the provisions of the act. But the act also provides that the title of a registered proprietor who has acquired title *bona fide* for a valuable consideration or of any person *bona fide* claiming under him shall not be affected.[6] In New Zealand, the statute provides that no action shall lie against the registered proprietor, except, among other cases, where a person is deprived of title "as against the registered proprietor of such land through fraud, or as against

matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts. In United States v. Fox, 94 U. S. 315, 320, 24 L. ed. 192, 193, it was said: 'The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.' See, also, McCormick v. Sullivant, 23 U. S. (10 Wheat.) 202, 6 L. ed. 303; Beauregard v. New Orleans, 59 U. S. (18 How.) 497, 15 L. ed. 459; Suydam v. Williamson, 65 U. S. (24 How.) 427, 16 L. ed. 742; Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888; Lathrop v. Commercial Bank, 8 Dana (Ky.) 114."

[5] Acts No. 380, 1886, § 69.

[6] Acts South Australia, No. 380, § 69.

a person deriving otherwise than as a transferee *bona fide* for value, from or through a person so registered through fraud." [7] In Tasmania, the holder of a registered title is entitled, except in case where fraud has been practiced, to hold the land subject to the liens excepted by the statute. The statute also confers a right of action for damages against the person who has been guilty of the fraud.[8] In Manitoba, the certificate is by statute conclusive evidence that the person named as the owner of the land, is such owner, subject to the statutery exceptions, and also subject to the right to show fraud in which the registered owner, mortgagee or incumbrancer has participated, or in which he has been guilty of collusion. The act specially provides that nothing contained in it "shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, over contracts for the sale or other desposition of land or over equitable interests therein." [9] In Ontario, it is made a felony for a person fraudulently to procure an entry in the registry. The statute also declares that any certificate of title "obtained by means of such fraud or falsehood shall be null and void for or against all persons other than a purchaser for valuable consideration without notice." [1] In speaking of the Australian system an author on that subject observes that, aside from any question of the special rights of the crown, there seem to be three classes of cases in which the certificate of title will not be conducive. "(1) Where a certificate of title of earlier date is in existence; (2) where the land has been made the subject

[7] New Zealand Act 1885, §§ 56, 182.

[8] 25 Vict. No. 16, 1862. These provisions are found substantially to the same effect in the other Australian colonies. See Queensland Act of 1861, §§ 44, 123, 126; Western Australian Act 56 Vict. No. 14, 1893, §§ 68, 199, 201; New South Wales Act No. 25, 1900, §§ 42, 43, 124, 126; Victoria Act, 1890, No. 1149, §§ 74, 205, 207.

[9] Manitoba Real Property Act 1 and 2 Edward VIII., chap. 43, § 71; Maniaoba Rev. States. 1902, c. 148; Jones on Torrens System, 337.

[1] Jones, Torrens System, 143, 144.

(wholly or partially) of a certificate of title by mistake, and (3) where the certificate of title has been obtained by fraud." [2]

§ 1458. Provisions in state statutes as to fraud.—The California statute declares that in case of fraud "any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act, provided that nothing contained in this section shall affect the title of a registered owner who has taken *bona fide,* for a valuable consideration or of any person *bona fide* claiming through or under him." [3] In Massachusetts, the decree of registration is declared to be conclusive "subject, however, to the right of any person deprived of the land, or any estate or interest therein by a decree of registration obtained by fraud, to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest." [4] A provision of substantially the same effect appears in the Philippine Act,[5] and in the Hawaiian Act putting into force the Torrens system.[6] In Oregon and Illinois, the person who is registered as owner, shall hold the land subject only to such estates as are noted or reserved by the statute, except in cases of fraud "to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith." [7]

§ 1459. Statutes in some states silent as to fraud.—The Minnesota statute contains no exception to the indefeasibility of the registered title, where the decree has been obtained

[2] Hogg, Australian Torrens System, 823.

[3] Gen. Laws 1903, p. 1397, Act 4115, § 37.

[4] Mass. Rev. Laws, 1902, c. 128, § 37.

[5] 3 Acts Philippine Com. No. 496, § 38.

[6] Rev. Laws, 1905, c. 154, § 2431.

[7] Oregon, Laws 1901, p. 483; 2 B. & C. Comp. § 5432; Illinois Laws, 1897, p. 141; Starr & Curtis' Ann. Stats. Supp. 1902 p. 266, c. 30, par. 48.

by fraud. The Colorado statute, which is based on the Minnesota statute, is likewise silent as to the effect of fraud. In the statute of Minnesota, it is declared that every person who secures a title pursuant to a decree of registration, and every subsequent purchaser taking a certificate of title for value and in good faith, shall hold the title free from all encumbrances, except only such estate, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and except also liens created by law, taxes and assessments, leases for a period not exceeding three years, where there has been actual occupation, public highways, and such right of appeal or contest as the statute itself may provide. The statute of this state allows the right of appeal to the Supreme Court within the period and upon the conditions prevailing in civil actions, and also provides that the decree, upon the petition of an interested party who had no actual notice of the proceedings, may be opened within sixty days after its entry. Provision is also made for the correction of mistakes, but the statute expressly declares that this "shall not give the court authority to open the original decree of registration. The statute contains no provision which expressly declares that a decree secured by fraud may be set aside even as against the person originally guilty of the fraud, and before the attachment of the rights of innocent parties. If an innocent purchaser has acquired any right within sixty days, the decree, according to the terms of the statute, shall not be opened, but, in the language of the statute, the person aggrieved by the decree "may pursue his remedy by action of tort against the applicant or any other person for fraud in procurng the decree." The statute makes it a felony to secure fraudulently the registration of a title, and permits an action to be brought against the county treasurer to recover from the insurance fund deposited with him such damages as the plaintiff may have sustained.[8]

[8] Minn. Rev. Laws 1905, § 3394. For Colorado Statute see Laws 1893, p. 298, c. 107; Mills Ann. Stat. Rep. Supp. c. 29.

§ 1460. Effect of fraud where statute is silent.—In Minnesota, the question was presented whether or not a decree of registration could be attacked on the ground that it was obtained by fraud. It was contended that it was the intention of the legislature to enact a law which, after the expiration of the time fixed by the statute, would vest an indefeasible title in the registered owner, notwithstanding the fact that fraudulent means had been employed to secure the registration. It was insisted that, as the statute of Minnesota contained no exception as to fraud, the legislature had departed from the ordinary course which prevents a party guilty of fraud from retaining the benefit of his wrong. It was said that the reason for this action was the importance of making the title absolutely indefeasible, and that the only remedy given to a defrauded land owner was a right to proceed against the guilty party and the right to resort to the insurance indemnity fund for indemnity. The court declared that if it was the intention of the legislature to insure protection to a party who, by means of fraudulent practices, had obtained in his own name the registration of another's land, such intention should have been clearly and definitely expressed, and not left to arise from implication. The court said that it must be presumed "that the legislature understood and expected that the courts of equity would remain open to parties who were able to bring themselves within the rules which require the granting of equitable relief. The fact that a statute does not expressly provide that fraud shall invalidate acts authorized to be done under it does not deprive the courts of the general power to protect the rights of parties. The principles which are recognized and enforced in courts of equity underlie our entire system of jurisprudence. They are no more excluded by the failure to insert an exception in the statute than by the failure of parties to insert a similar exception in a private contract. Equity will not allow a party to hold the benefits of a fraudulent transaction although obtained under the forms of law. It is the just and proper

pride of our system of equity jurisprudence that fraud vitiates every transaction. However men may surround it by forms, solemn instruments, proceedings conforming to all the details required by the law, or even by the formal judgment of a court, a court of equity will disregard them all, if necessary, that justice and equity may prevail."[9] The court declared

[9] Baart v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394. "It has often been held" said the court "that the general terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences: Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069; State v. Board of Commrs. of Red Lake County, 67 Minn. 352, 69 N. W. 1083; Duckstadt v. Board of Co. Commrs. of Polk County, 69 Minn. 202, 71 N. W. 933; State v. Rollins, 80 Minn. 216, 83 N. W. 141; State v. Barge, 82 Minn. 256, 53 L.R.A. 428, 84 N. W. 911; State v. City Council, 87 Minn. 156, 91 N. W. 298; United States v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719. For English authorities in which the courts have raised implications when necessary to prevent injustice, see articles in 20 Law Quar. Rev. 399, and 22 Law. Quar. Rev. 299.

"The rule which authorizes an exception or an evident omission to be read into a statute was applied by this court in State v. Board of County Commrs. of Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216, where it was held that the omission from a statute of a provision the absence of which would render the statute unconstitutional would be presumed unintentional. "We are not, said the court, "authorized to indulge in the presumption that the legislature wilfully intended by the passage of this act to depart from the settled law of the land." Hence when necessary to prevent a fraud, a court of equity will read an exception into a statute which is expressed in general terms.

"By statute 2 Anne, chapter 20, all unregistered conveyances of land were declared fraudulent and void as against subsequent purchasers for a valuable consideration. The statute did not except purchasers with full knowledge, and the courts of law held that a subsequent deed was void, although the party claiming under it had full knowledge when it was executed of the existence of the prior deed: Doe v. Allsop, 5 Barn. & Ald. 142. But the courts of equity, in order 'to maintatin and extend a righteous and beneficient jurisdiction,' nigrafted an exception into the act of parliament. In the language of Lord Mansfield, 'Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside because he has that notice which the act of parliament intended he should have'; Doe v. Routledge,

that the presumption was not to be indulged that the legislature would enact a law for the benefit of the public and also to protect the rights of individuals, and at the same time intended, by its failure to place in the statute an exception in cases of fraud, to deprive the courts of their jurisdiction long established and universally recognized to give protection to those injured by the commission of fraud. The court confined its ruling to the case where the land remained registered in the name of the fraudulent wrong-doer, but observed that other considerations would prevail where the rights of an innocent purchaser for value, becoming such in reliance in the register, should be involved.[1]

§ 1461. Service upon defendants.—It is provided by the Minnesota statute that all persons named in the application, or found by the report of the examiner as being in possession of the premises, or as having of record any lien, incumbrance, right, title, or interest in the land, shall be and shall be known as defendants.[2] The court held that this provision of the statute was mandatory, and that a failure to follow the advice and suggestion of the examiner of titles renders the judgment invalid for want of jurisdiction over the person named.[3] Subsequently a reargument was granted upon the proposition, among others: "Is the judgment in-

Cowp. 705. The principle is applied in a line of English cases beginning with LeNeve v. LeNeve, Amb. 436, 1 Ves. 64, 2 White & Tudor's Leading Cases in Equity, 109, decided under registration acts which contained no exception of fraud or a provision in favor of *bona fide* purchasers only."

[1] Baar v. Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394. In this case, registration was secured by active fraud and the intervenor was a party to the fraudulent transactions under circumstances supplying the moral element which forms the distinction between actual and legal fraud and hence the court said that it was not required to decide whether mere notice of the rights of others would constitute fraud under the statute.

[2] Minn. Laws, 1901, p. 353, c. 237.

[3] Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317.

valid and void as to all parties defendant, or simply invalid and void as against the person or party named by the examiner, and who should have been designated in the summons as defendant?" [3a] Upon reargument, the court held that where the examiner of titles suggests that a certain person shall be made a defendant a failure to observe this suggestion invalidates the judgment as against such person and, also, against all persons, whether natural or artificial, in privity with him, who are not defendants in the proceeding.[4] If a person is named as a defendant in proceedings under the act, has been regularly served with process, and has allowed judgment to be entered regularly against him, he cannot as a matter of right apply to come in and defend against lien claimants. The court, in the exercise of its discretion, may refuse his application.[5]

§ 1462. **Withdrawal of application before final decree.**—The statute of Massachusetts provides that "the applicant may withdraw his application at any time before final decree, upon terms to be determined by the court." [6] A person filed an application for the registration of his title under the statute, and a town affected, as well as the attorney-general of the state, appeared and set up a defense that the property sought to be registered was subject to rights appertaining to a public landing. A decree of confirmation was entered and the title, free from incumbrances, was registered in the plaintiff. A motion for new trial was subsequently heard and finally the petitioner filed a withdrawal of his application for registration, "subject to such terms as the court may fix," pursuant to the terms of the section above cited. Bills of exceptions were allowed on the various proceedings and the land court

[3a] Dewey v. Kimball, 89 Minn. 454, 95 N. W. 895.

[4] Dewey v. Kimball, 89 Minn. 454, 96 N. W. 704.

[5] Reed v. Carlson, 89 Minn. 417, 95 N. W. 303.

[6] Mass. Rev. Laws, c. 128, § 36.

provided by the act denied the plaintiff's application for a withdrawal on the ground that he had no right to withdraw without the permission of the court by determining terms, and, in the status of the case at that time, such permission should not be granted. The court stated that it was evident that, by enacting this provision, the legislature did not intend to adopt either the rule of the common law or that of equity.[7] The court decided that the petitioner had the right to withdraw at the time that he filed his petition for that purpose, and that by the filing of the petition all proceedings were terminated, if the petitioner complied with any order which the court might make in imposing terms upon the petitioner. The right to proceed was suspended by the filing of the withdrawal until the terms had been fixed by the court and the period had arrived for the plaintiff to comply or not to comply.[8]

[7] McQuesten v. Attorney General, 198 Mass. 172, 83 N. E. 1037. The court stated these rules to be: "In an action at law the plaintiff can become nonsuit at any time before a trial on the merits is begun and not after as matter of right. Carpenter & Sons v. N. Y. N. H. & H. R. R., 184 Mass. 98, 68 N. E. 28.

"And a plaintiff cannot discontinue in equity after a decree or other proceeding whereby the defendant's situation has been materially changed, so that he has acquired rights which did not exist or which had not been determined when the suit was brought, and which render it equitable that those rights should be fully secured by further proceedings in the case: Worcester v. Lakeside Mfg. Co. 174 Mass. 299, 301, 54 N. E. 833.

"When the point is reached that a departure from the rule which obtains either at common law or in equity was intended, there is no stage in the proceeding which we can say was intended by the words of section 36 'at any time before final decree' short of the entry of the decree provided for by section 39."

[8] McQuesten v. Attorney General, 198 Mass. 172, 83 N. E. 1037. The court said that its construction of the Massachusetts statute was confirmed by the provisions in the Australian Torrens acts from which the Massachusetts act was drafted and on this point observed: "The Torrens acts then in force in New South Wales (Act No. 25, 1862, § 24), Queensland (St. 25 Vict. No. 14, § 29, and St. 41 ict. No. 18, § 9), South Australia (Act No. 330, 1886, § 41), and Tasmania (St. 25 Vict. No. 16, § 25) provided that an applicant

§ 1463. Burden on plaintiff to establish title.—To establish title in the plaintiff it is not sufficient for him to show a mere *prima facie* title. He is required to establish a fee

might withdraw his application at any time before the issuing of the certificate of title. The acts in force in Victoria (Act No. 1149, 1890, § 36) and Western Australia (St. 55 Vict. No. 10, § 34) contained the same provisions with the addition that if those in opposition should have been put to expense without sufficient cause by reason of such application they should be entitled to receive from the applicant such a compensation as a judge on a summons in chambers should deem just and order. Finally, the act then in force in New Zealand provided in effect that after a defendant appeared in opposition the application could not be withdrawn without leave of the judge (Act 1885, No. 57, §§ 27, 141).

It is manifest that the Massachusetts Legislature did not intend to follow that in New Zealand, which made the right of withdrawal dependent on the discretion of the judge, nor those in New South Wales, Queensland, South Australia, and Tasmania, where the right of withdrawal at any time before the certificate was issued was absolute and not subject to terms, but did follow that in Victoria and Western Australia, where it is absolute but subject to terms to be imposed by the court.

The *punctum temporis*, in all these acts (namely, those of New Zealand, New South Wales, Australia, Tasmania, Victoria and Western Australia) is in substance at any time prior to the issuing of the certificate of title. It is manifest that the Massachusetts act followed these acts on that point and that no change was intended in adopting the entry of the final decree in place of the issuing of the certificate of title. The entry of the final decree is the decisive act; if a final decree is entered, the certificate of title issues as of course. Since that is so, and since the certificate of title is a transcription of the final decree, it was more accurate, if one of the two was to fix the time when the right to withdraw should come to an end, to adopt the decree and not the issuing of the certificate.

The view taken of an application for registration and confirmation of title (or, as it is more felicitously termed in the Australian act an application to bring land within the operation of the act) which led to an absolute right of withdrawal before final decree or its equivalent, the issuing of a certificate of title, appears to be this: Such an application is not, primarily at any rate, the beginning of a controversy between party and party. If such an application is filed a controversy may and in many cases will result. But the primary object of such an application is to get a certificate of title to the petitioner's land which has the attributes in substance, for practical purposes, of a certificate of title to a

simple title and to show that the claim made by a defendant is invalid.[9] A proceeding under the Torrens Act is not a bill in equity to remove a cloud on the plaintiff's title, but it is an application for the initial registration of the title, and the object of the statute is to subject the titles of all parties to the proceeding, as well as every other title or claim to judicial investigation. The object to be attained is to ascertain and declare the true state of the title in fee. If the applicant is unable to prove such a title as may be properly registered, he will be unable to secure relief, either by the registration of his own title or by an adjudication that there is no title in the adverse claimants. It is proper for a defendant in such a proceeding to insist that there has been failure of proof to show a title of the kind required, by the statute for registration. If there is such failure of proof of title, it is not competent for the court to render a decree removing the claims made by a defendant as a cloud upon the title of plaintiff, but, in such a case, the court should dismiss the application of the plaintiff.[1]

§ 1464. Respondent becoming petitioner by amendment.—Under the statute of Massachusetts an amendment cannot be allowed by which the respondent becomes the petitioner and *vice versa*. In case the respondent desires to become a petitioner it is necessary for him to file a separate petition of his own or to file a cross petition.[2] "The power given to the land court by Rev. Laws [2a] to allow amend-

share in the capital stock of a corporation. And treating the application as an application to bring the *locus* within the new system if at any time before the land has been brought within the operation of it the petitioner changes his mind and on the whole concludes that he prefers to leave his title as it was before the Torrens system was adopted, he shall be at liberty to do so."

[9] Glos v. Kingman & Co., 207 Ill. 26, 69 N. E. 632.

[1] Glos v. Kingman & Co., 207 Ill. 26, 69 N. E. 632.

[2] Foss v. Atkins, 201 Mass. 158, 87 N. E. 189.

[2a] Citing C. note 28,522.

ments to the petition by way of substitution," said Justice Loring, "permits a third person who has succeeded to the rights of the petitioner being substituted for him as petitioner. Again, the power given by section 23 to allow severance of the application authorizes the land court to permit the petitioner to split his application so as to go on with one and not with another of two or more tracts originally included in one application. But we know of no principle of procedure or practice either in personal actions or *in rem,* nor do we know of any provision in Rev. Laws,[3] which authorizes the land court to allow an amendment by which the respondent becomes the petitioner and the petitioner the respondent." [4]

§ 1465. Degree of proof required.—All persons are considered as defendants, and the decree is intended to bind and conclude the whole world. The act contemplates that an absolute title in fee simple should be registered and not merely a *prima facie* title as, by his application, the applicant asserts that he is the owner of the title as against the world, and he is required to establish such fact. The object of the act is to establish the title and to enable the public or any person seeking to acquire an interest in the land to learn by inspecting the register the true condition of the title. If the only proof offered to establish the title is a warranty deed from the grantor of the application, without evidence tending to show that such grantor had title, the proof is insufficient to establish title so as to meet the requirements of the statute and the application should be dismissed.[5] It is not necessary for the applicant to establish affirmatively that tax deeds held by defendants to the proceeding are invalid.[6] Under the

[3] Chap. 128.

[4] Foss v. Atkins, *supra.*

[5] Glos v. Cessna, 207 Ill. 69, 69 N. E. 634.

[6] McMahon v. Rowley, 238 Ill. 31, 87 N. E. 66; Glos v. Kingman & Co., 207 Ill. 26, 69 N. E. 632; Glos v. Hoban, 212 Ill. 222, 72 N. E. 1; Glos v. Talcott, 213 Ill. 81, 72 N. E. 707; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80. The same rule applies to establishing title un-

Massachusetts statute permitting persons claiming an interest in the fee to apply for registration, the owner of a life estate cannot have his title registered.[7]

§ 1466. **Examiner as referee.**—The position occupied by an examiner is similar to that of a referee appointed by the court, and the court is not bound by his report but may demand further proof. "His report has the same force and effect as a referee appointed by the district court under the laws relating to the appointment and duties of referees. The court may order such other or further hearing of the cause before the court or before the examiner of titles, after the filing of the report of the examiner above referrd to, and require such other or further proof as the court may deem proper."[8] If it is desired to review on appeal objections to the admission of evidence on the hearing before the examiner, they should be incorporated in a bill of exceptions to the master's report and renewed in the court trying the case.[9] Under the Massachusetts statute which authorizes appeals from the land court to the superior court, and which requires that the judge of the land court should file in the superior court a report of his decision and of the facts found by him, he is obliged to state only briefly the important matters which have occurred before him. If he frames issues for the superior court on appeal, the pertinency of the issues so framed is *prima facie* established, and it will be assumed that the issues are material and that the land court passed on all material issues, where there is no showing to the contrary.[1]

der the burnt records act: Gage v. Caraher, 125 Ill. 447, 17 N. E. 777.

[7] Baxter v. Bickford, 201 Mass. 495, 88 N. E. 7.

[8] People v. Coussman, 41 Colo. 450, 92 Pac. 949.

[9] Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

[1] Old Colony St. Ry. v. Thomas, (Mass) 91 N. E. 1006.

§ 1467. **Approval of report after examiner's death.**—After the examiner's death the court can approve his report, where its conclusions are supported by the evidence returned with the transcript of the report, and where before the death of the examiner the report was before the court.[2] It will be presumed on appeal that the examiner considered only competent evidence in making his findings if there is sufficient competent testimony in the report to support the findings.[3]

§ 1468. **Rules of evidence.**—Generally speaking, the rules of evidence apply in proceedings to register a title under the Torrens system that prevail in ordinary actions.[4] It is competent to show the declarations of a former deceased occupant of the property, who claimed under a deed.[5] On the question of adverse possession, evidence may be admitted to show that the petitioner paid a sum of money for the land, and that also while he held the land he made improvements upon it.[6] In a case in Massachusetts to register a title, the court held that a description in a deed of land as "beginning at a point on the shore" and thence by metes and bounds "to the shore," "along the shore," etc., and also as "bounded westerly by Squam River," which was an arm of the sea, did not confine the boundary to the headwater mark, but was sufficient to include the flats.[7]

[2] McMahon v. Rowley, 238 Ill. 31, 87 N. E. 66.

[3] McMahon v. Rowley, 238 Ill. 31, 87 N. E. 66; Champion v. McCarthy, 228 Ill. 87, 11 L.R.A. (N.S.) 1052, 81 N. E. 808; Kreiling v. Nortreys, 215 Ill. 195, 74 N. E. 123.

[4] See Glos v. Cesna, 207 Ill. 69, 69 N. E. 634; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Glos v. Grant, Building Association, 229 Ill. 387, 82 N. E. 304; Gage v. Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653.

[5] Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032.

[6] Luce v. Parsons, 192 Mass, 8, 77 N. E. 1037.

[7] Haskell v. Friend, 196 Mass. 198, 81 N. E. 962.

§ 1469. **Not necessary that title should be of record.**—It is provided generally in the statutes establishing the Torrens system that an "owner" may have his title registered by complying with the provisions of the statute. But it does not follow that the title of the applicant must appear of record. In a case in which this point was decided the applicant relied on an unrecorded deed from the person conceded to be the owner of the land. It was contended that the applicant possessed no standing or right to maintain the proceeding, but the court said that, while some provisions of the statute seemed to justify the contention that the applicant should be the record owner, "it would require a strained construction to hold with the state on this point, and say that no one but those who appear upon the records as owners of real property are entitled to the relief provided by the act. So we construe the act as entitling any owner of land, whether his title be of record in the office of the register of deeds or not, to maintain proceedings thereunder to register his title." [8]

§ 1470. **Certainty in location.**—The applicant must describe the property with sufficient certainty to enable a decree to be entered that will identify the property. If a deed describes the land as a specified lot in a subdivision, this description is sufficient, if there is no offer of a plat of any subdivision, and if there is no evidence that there ever was a plat or a subdivision.[9] "It was necessary for the applicant to show title to the premises in himself, and therefore essential that the conveyance under which he claimed should identify the premises so that they could be ascertained by the description." [1]

[8] National Bond & Security Co. v. Anderson, 99 Minn. 137, 108 N. W. 861.

[9] Glos v. Ehrhardt, 224 Ill. 532, 79 N. E. 605.

[1] Glos v. Braydon, 229 Ill 223, 82 N. E. 224.

§ 1471. Mechanics' Liens.—Under the Torrens Act, it was decreed in Minnesota, that the court has no power to order the foreclosure of mechanics' liens. The object of the act is to create a summary process for determining rights and interests in real property, and to authorize the court to fix in definite form the title and the rights of all persons therein. In such a proceeding the court should ascertain and declare the existence and validity of all mechanics' liens, as being incumbrances upon the title, but should not, in the proceeding itself, decree their foreclosure.[2] But if the registration pro-

[2] Reed v. Siddall, 94 Minn. 216, 102 N. W. 453. Mr. Justice Brown who delivered the opinion of the court said: "A full and careful consideration of the act leaves our minds clear that the Legislature did not intend to provide for the foreclosure of mortgages, mechanics' or other liens, in the proceedings thereunder to register title. The object and purpose of the statute was to provide a speedy and summary method of determining rights and interests in real property, and to authorize the court in proceedings thereunder to hear and determine all controversies respecting the title, and by proper decree definitely to fix, establish, and declare the rights and interests of all interested parties. The act provides for and contemplates the determination by the court of the validity of all claims of liens or incumbrances, but not their foreclosure or enforcement. Section 7, by which power and authority to act is conferred upon the court, provides that the court may 'inquire into the condition of the title to and any interest in the land, and any lien or encumbrance thereon, and to make all orders, judgments and decrees as may be necessary to determine, establish and declare the title or interest, legal or equitable, as against all persons, known or unknown, and all liens and encumbrances thereon, whether existing by law, contract, judgment, mortgage, trust deed or otherwise and to declare the priority as between the same, and to remove all clouds from the title.' Section 30 provides that every person receiving a certificate of title issued pursuant to the decree of registration shall hold the same free from all incumbrances, except only such estates, mortgages, liens, charges, and interests as may be noted in the certificate of title; and only such are to be noted therein as are declared to exist by the judgment and decree of the court. Section 31 provides that every decree of registration shall bear the proper date, contain a description of the land involved, set forth the estate of the owner, and all estates, mortgages, easements, liens, attachments, or other incumbrances to which the land is subject; and further, that imme-

ceedings are regular, and there has been no fraud in securing the decree, the lienholders are bound by the decree, although

diately upon the decree being entered, a certified copy thereof shall be filed with the register of titles for the benefit of all parties dealing in the land. Section 36 provides that every certificate of registration shall contain the name of the owner, a description of the land, the estate of the owner, and by memorandum or notation contain also a description of all incumbrances, liens and interests to which the estate of the owner is subject. These provisions of the act clearly indicate an intention to limit the authority of the court to an inquiry into and determination of the rights of the respective claimants to real property, to declare and fix definitely the estate or interest each has therein, and to enter a decree accordingly. The act contains no suggestion from beginning to end that mortgages or liens may be foreclosed in proceedings thereunder, either by the person seeking to register his title or by a defendant asserting a mortgage, lien or other incumbrance. The most the court is authorized to do in any case is to determine the existence, validity, and priority of liens of conflicting claimants. That the Legislature intended that the ordinary proceedings for the enforcement of such liens should remain in force and be resorted to is also clear. Section 54 provides that nothing contained in the act shall be construed in any way to relieve land 'title to which has been registered thereunder' from any liability to attachment, levy on execution, or from liability to liens of any description established by law, or to change or affect in any way any liability created by law and applicable to unregistered land, except as otherwise expressly provided in the act. Section 59 provides that all charges upon registered lands, or any estates or interest in the same may be enforced in the manner prescribed by law, and that all laws relating to the foreclosure of mortgages, shall apply to mortgages upon registered land. Section 68 covers the case at bar. It provides that all attachments, liens, and rights of every description shall be enforced, discharged, or dissolved by any proceedings sufficient and proper in law to enforce, discharge, or dissolve like liens on unregistered land. This section construed in connection with the restricted authority conferred upon the court by section 7, would seem to settle the question adversely to appellants. It shows beyond doubt an intention on the part of the Legislature to require all such liens to be foreclosed in the usual manner, and under the provisions of the general statutes providing for their foreclosure and enforcement. The validity of any such lien may and must be determined in the registration proceedings, but when its validity has been adjudicated and determined by the court, and the state of the title declared, it must be enforced in the manner prescribed by the general statutes.

it did not recognize or establish their lien.[3] In an action to foreclose a mechanics' lien, the defense made was that a decree registering the title to the land affected, under the Torrens system, did not recognize the lien. The court held that, as the registration proceedings were regular and the decree was not secured by fraud, the parties holding the lien were concluded by the decree.[4]

§ 1472. **Abstracts of title.**—In some of the statutes it is provided that an abstract of title, properly certified by an abstractor who has given the bond and complied with the other requirements of the statute, may be received by the court for the purpose of establishing title to form the basis of registration. But if the statute contains no such provision, and there is no evidence of the loss or destruction of the original deeds, or that an abstract book offered in evidence was on file in the recorder's office, a book of abstracts not identified or proven to be a public record, or an abstract of title to the land sought to be registered, is not admissible in evidence. "The act for registering title" said the court, "may be of a progressive nature, but not to the extent of abrogating the rules of evidence, and permitting the introduction of abstracts without proper foundation being laid."[5] The position which the examiner of titles holds to the court is similar to that of a master in chancery.[6] It is not the province of the examiner

The pendency of a proceeding to register title would not be a bar to an action to foreclose the lien. While the validity of the lien might be involved in the litigation in the registration proceeding, full relief could not there be granted the lienholder, and the pendency of that proceeding would in no manner interfere with bringing an action for foreclosure."

[3] Doyle v. Wagner, (Minn.) 122 N. W. 316.

[4] Doyle v. Wagner, (Minn.) 122 N. W. 316. See, also, Doyle v. Wagner, 100 Minn. 380, 111 N. W. 275.

[5] Glos v. Cessna, 207 Ill. 69, 69 N. E. 634. See, also, Glos v. Hallowell, 190 Ill. 65, 60 N. E. 62.

[6] Gage v. Consumers Electric Light Co., 194 Ill. 30, 64 N. E.

to make examinations *ex parte* of abstracts of titles not introduced in evidence, nor of the original records,[7] and before he can consider an abstract the proper foundation for its admission in evidence should be laid.[8]

§ 1473. Omission to provide for children in will.—In Massachusetts, the law, as elsewhere, is that if a testator omits to make provision in his will for any of his children, the child so omitted shall take the same share of his estate that he would have taken in case of intestacy, unless provision for such child has been made by the testator in his lifetime, or unless it appears that the omission to provide was intentional. It is a question of fact whether such omission to provide is intentional or accidental. The court held that the land court created to administer the Torrens Act had jurisdiction to decide this question of fact and to determine whether an omission on the part of a testator to provide for his child was intentional.[9]

653; Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

[7] Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

[8] Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Glos v. Talcott, 213 Ill. 81, 72 N. E. 707. See, also, McMahon v. Rowley, 238 Ill. 31, 87 N. E. 66.

[9] Woodvine v. Dean, 194 Mass. 40, 79 N. E. 882.

CHAPTER XLI.

MARKETABLE TITLE.

§ 1474. What is a marketable title.
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1529. Purchaser not concluded by advice of his attorney.
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§ 1474. **What is a marketable title.**—When a person agrees to convey a marketable title, either by the use of these words, or, of language having a similar signification, he, in law, will be held to mean a title free from reasonable doubt, and the purchaser will not be compelled to consummate the purchase and accept the title, if in the record title there is a defect, for the removal of which resort must be had to evidence not supplied by a record. The title may be good in fact, but it must also be good of record.[1] If a contract of sale for land, where the purchase price is to be paid in install-

[1] Speakman v. Forepaugh, 44 Pa. 363; Block v. Ryan, 4 App. D. C. 283; Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868; Brown v. Widen, (Iowa,) 103 N. W. 158; Fagan v. Hook, (Iowa,) 105 N. W. 155; Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1119; Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126; Horn v. Bubler, 39 Minn. 515, 40 N. W. 833; Kane v. Rippey, 22 Or. 296, 23 Pac. 180; Lessenich v. Sellers, 119 Iowa, 314, 93 N. W. 348; Howe v. Coates, 97 Minn. 385, 4 L.R.A. (N.S.) 1170, 107 N. W. 397.

ments, provides the "title to be good or the money to be refunded, party of the first part to furnish abstract of title to said land," and the abstract supplied by the vendor fails to show a good title, the purchaser may rescind the contract. He may do this, although, as an actual fact, the vendor did possess a good title to the property, if he did not offer to perfect the abstract or to cause a perfect one to be supplied before the time fixed for the second payment.[2] It will not answer to say that the title is capable of being made good by the production of oral testimony or even by affidavits. It is requisite that the title should appear on the record to be good.[3] A material defect in the title may be said to exist when it will create a reasonable doubt in the mind of a prudent and intelligent man, acting on competent legal advice, and cause him to refuse to take a conveyance of the title at the fair value of the property.[4] In a case where the contract provided that "the purchaser shall be furnished a complete abstract showing good and marketable title in the owner," the court declared: "The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt; in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion. He can only demand such title as a reasonably well informed and intelligent purchaser, acting upon business principles, would be willing to accept." [5] When

[2] Boas v. Farrington, 85 Cal. 535, 24 Pac. 787.

[3] Speakman v. Forpaugh, 44 Pa. 363; Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A 161, 24 N. E. 868; Block v. Ryan, 4 App. D. C. 283; Howe v. Coates, 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 107 N. W. 397.

[4] Harrass v. Edwards, 94 Wis. 459, 69 N. W. 69.

[5] Cummings v. Dolan, 52 Wash. 496, 100 Pac. 898, 132 Am. St. Rep. 986. See to the same effect: Miller v. Cramer, 48 S. C. 282, 26 S. E. 657; Zelman v. Kaufherr, 73 Atl. 1048; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Street v. French, 147 Ill. 342, 35 N. E. 814; Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868; Methodist Episcopal Church v. Roberson, 68 N. J. Eq. 431, 53 Atl. 1056; Gill v. Wells, 59 Md. 42; Hayes v. Harmony Grove Cemetery, 108 Mass. 400;

the title comes by inheritance, it may be doubtful whether others other than those who joined in the conveyance may not be in existence.[6] There is no presumption, however, that a title derived by purchase at an administrator's sale is defective because it is possible that heirs exist who were not brought into the proceedings by the administrator's petition for permission to sell, when the proceedings apparently are regular.[7]

Empire Realty Co. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371; Thompson v. Dulles, 5 Rich. Eq. (S. C.) 1370; Laurens v. Lucas, 6 Rich. Eq. (S. C.) 217; Wallenberg v. Ross, 45 Or. 615, 78 Pac. 751. There must be a rational doubt, "such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous and astute niceties, but such as produces real and *bona fide* hesitation on the mind of the chancellor": Gill v. Wells, 59 Md. 492. Objection to a title cannot be based on a bare possibility: Miller v. Cramer, 48 S. C. 282, 26 S. E. 657. See as to illustrations where objections to the title were held not to be well founded: Prichard v. Mulhall, 140 Iowa, 1, 118 N. W. 43; White v. Bates, 234 Ill. 276, 84 N. E. 906; Newbold v. Condon, 104 Md. 100, 64 Atl. 356; Jay v. Wilson, 91 Hun, 391, 36 N. Y. S. 186; Abraham v. Mayer, 7 Misc. Rep. 250, 27 N. Y. S. 264; Kendall v Crawford, 77 S. W. 364, 25 Ky. Law Rep. 1224; Sisters of Mercy in City of Baltimore v. Benzinger, 95 Md. 684, 53 Atl. 448; Hoepner v. Sevestre, 56 Hun, 640, 10 N. Y. S. 51; Ebling v. Dreyer, 79 Hun, 319, 29 N. Y. S. 459; Young v. Harvey, 207 Pa. 396, 56 Atl. 946; McArthur v. Weaver, 129 App. Div. 743, 113 N. Y. S. 1095; Odell v. Claussen, 120 App. Div. 535, 104 N. Y. S. 1104; Bacot v. Fessenden, 130 App. Div. 819, 115 N. Y. S. 698; Port Jefferson Realty Co. v. Woodhull, 128 App. Div. 188, 112 N. Y. S. 678; Messinger v. Foster, 115 App. Div. 689, 101 N. Y. S. 387; Hagan v. Drucker, 90 App. Div. 28, 85 N. Y. S. 601; Tolosi v. Lese, 120 App. Div. 53, 104 N. Y. S. 1095; Grosso v. Marx, 45 Misc. Rep. 500, 92 N. Y. S. 773; Board of Education v. Reilly, 71 App. Div. 468, 75 N. Y. S. 876; Adams v. Backer, 29 Misc. Rep. 93, 60 N. Y. S. 683; Pell v. Pell, 169 N. Y. 607, 62 N. E. 1099, affirming 65 App. Div. 388, 73 N. Y. S. 81; Brown v. Mount, 38 App. Div. 440, 56 N. Y. S. 613; Reece v. Haymaker, 164 Pa. 575, 30 Atl. 404.

[6] Beckwith v. Marryman, 2 Dana (Ky.) 371; Hays v. Tribble, 3 B. Mon. (Ky.) 106; Barnett v. Higgins, 4 Dana (Ky.) 565.

[7] Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966. See, also, Greffet v. Willman, 114 Mo. 106, 21 S. W. 459; Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99.

§ 1475. **Title subject to judicial doubt.**—A title which can be acquired in possession only by litigation and judicial decision is not such a title as a purchaser is compelled to accept and pay for. As a general rule it may be stated that a title is not marketable which is the subject of judicial doubt,[8] or, to put the matter in another form, the title should be free from reasonable doubt.[9] It is said, however, that a title dependant upon a fact must be deemed marketable "when the fact is so conclusively proved, in the suit for specific performance, that a verdict against the existence of the fact would not be allowed to stand in a court of law, and where there is no reasonable ground for apprehending that the same fact cannot be, in like manner, proved, if necessary, at any time thereafter for the protection of the purchaser." [1] The purchaser has a right to demand a good title of record where the contract of sale calls for "a perfect title." [2] A

[8] Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

[9] Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 925; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; Sproule v. Davies, 69 N. Y. App. Div. 502, 75 N. Y. Supp. 229; Weil v. Radley, 31 N. Y. App. Div. 25, 52 N. Y. Supp. 298; Fuhr v. Cronin, 82 N. Y. App. Div. 210, 81 N. Y. Supp. 536; Kerrigan v. Backus, 69 N. Y. App. Div. 329, 74 N. Y. Supp. 906; Simis v. McElroy, 12 N. Y. App. Div. 434, 42 N. Y. Supp. 290; Wright v. Mayer, 47 N. Y. App. Div. 604, 62 N. Y. Supp. 610; Morrison v. Waggey, 43 W. Va. 405, 27 S. E. 314; Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Hedderly v. Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. Rep. 521; Richmond v. Koenig, 43 Minn. 480, 45 N. W. 1093; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732; Holmes v. Woods, 168 Pa. St. 530, 32 Atl. 54; Muller v. Palmer, 144 Cal. 305, 77 Pac. 954; Kilpatrick v. Barron, 125 N. Y. 751, 26 N. E. 925; Connelly v. Putnam, 111 S. W. 364; Jeffries v. Jeffries, 117 Mass. 184; Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 22 N. E. 925, 12 Am. St. Rep. 844; Wadick v. Mace, 118 App. Div. 777, 103 N. Y. Supp. 889; Mitchell v. Stinmetz, 97 Pa. 251. See, also, Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. Rep. 432; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724; Swayne v. Lyon, 67 Pa. St. 436; Todd v. Union Dime Sav. Inst., 128 N. Y. 636, 28 N. E. 504.

[1] Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483.

[2] Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189; Benson v. Shotwell, 87 Cal. 49; Sheehy v.

marketable title is said to be one of such a character that a prudent man knowing all the facts and their legal significance would be willing to take it.[3] A title is not marketable, if there still exists a reasonable doubt after the production by the vendor of all his possible proofs,[4] nor will a title be regarded as marketable if the vendor cannot negative the existance of persons who would have the right to attack his title.[5] A court, without deciding that the title is bad, may consider it so doubtful that it will not force a purchaser to accept it.[6] Thus, where one agrees to buy land whose title is based upon entries under the land laws of the United States, he is not required, in order to defeat a suit to compel a performance of the contract, to prove that the entries were fraudulent, by evidence sufficient to authorize a court to cancel them on the ground of fraud; but the cumulative force of circumstances insignificant while considered separately, may be sufficient to create in the mind of a reasonable man a doubt as to the validity of the title sought to be conveyed.[7]

§ 1476. **Title to be "first class."**—A provision that the title shall "first class" has no greater signification than that the title shall be marketable.[8] The doubt that may be raised as to the validity of the title should be of such a nature that there would be hesitation in the judicial mind before deciding it. It must be fairly debatable.[9] Where the contract calls for an abstract showing good title, nothing less than this will comply with the condition, irrespective of the vendor's

Miles, 93 Cal. 288; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

[3] Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105.

[4] Shriver v. Shriver, 86 N. Y. 575.

[5] Fuhr v. Cronin, 82 App. Div. 210, 81 N. Y. Supp. 536.

[6] Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868.

[7] Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868.

[8] Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195, 17 Am. St. Rep. 634.

[9] Hedderly v. Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. Rep. 521.

title.[1] It would be impracticable to go minutely into all the cases in which the defect urged has been held either material or immaterial, as each case must depend in a great measure upon its own peculiar circumstances, but in the following sections some of the more important principles by which courts are guided in determining whether or not a title is marketable will be discussed.[2]

[1] Brown v. Widen, (Iowa,) 103 N. W. 158. For numerous other cases maintaining and applying the same principle see, Lessenick v. Sellers, 119 Iowa, 314, 93 N. W. 348; Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1119; Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126; Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767; Sturtevant v. Jaques, 14 Allen, 523; Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605; Irving v. Campbell, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; Sharp Street Station v. Rother, 83 Md. 289, 34 Atl. 483; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Greenblatt v. Hermann, 144 N. Y. 13, 33 N. E. 966; Todd v. Union Dime Sav. Inst., 128 N. Y. 636, 28 N. E. 504; Page v. Greeley, 75 Ill. 400; Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991; Frazier v. Boggs, 37 Fla. 307, 20 So. 245; Herman v. Somers, 158 Pac. 424, 27 Atl. 1050, 38 Am. St. Rep. 851; Swayne v. Lyon, 67 Pa. 436; Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070; Paulmier v. Howland, 49 N. J. Eq. 364, 24 Atl. 268; Harding v. Olson, 177 Ill. 298, 52 N. E. 482; Clouse's Appeal, 192 Pa. 108, 43 Atl. 413; Street v. French, 147 Ill. 342, 35 N. E. 814; McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Early v. Douglass, 110 Ky. 813, 62 S. W. 860; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Spencer v. Sandusky, 46 W. Va. 582, 33 S. E. 221; Ruess v. Ewen, 165 N. Y. 633, 59 N. E. 1130; Fahy v. Cavanagh, 59 N. J. Eq. 278, 44 Atl. 154.

[2] In the following cases the title was held to be good and the doubt raised was held to be untenable: Macomb v. Miller, 9 Paige, N. Y. 265; Davidson v. Jones, 112 N. Y. App. Div. 254, 98 N. Y. Supp. 265; Messinger v. Foster, 115 App. Div. 689, 101 N. Y. Supp. 387; Board of Education etc. v. Reilly, 71 App. Div. 468, 75 N. Y. Supp. 876; Ladd v. Whitney, 117 Mass. 201; Cushing v. Spaulding, 164 Mass. 287, 41 N. E. 297; Hutchings v. Baldwin, 7 Bosw. (N. Y.) 236; Leeds v. Sparks, 8 Del. Ch. 280, 68 Atl. 239; Heck v. Volz, 14 N. Y. St. 265; Hatt v. Rich, 59 N. J. Eq. 492, 45 Atl. 969; Cruikshank v. Parker, 52 N. J. Eq. 310, 29 Atl. 682, reversing 51 N. J. Eq. 21, 26 Atl. 925; Hoeveler v. Hune, 138 Pa. St. 442, 21 Atl. 15; Greenblatt v. Herrmann, 144 N. Y. 13, 38 N. E. 966; Small v. Marburg, 77 Md. 11, 25 Atl. 920; Hagan v. Drucker, 90 App. Div. 28, 85 N. Y. Supp. 601; Brown v. Mount, 38

§ 1477. **Resort to parol evidence.**—As a purchaser is under no obligation to make an investigation into matter not disclosed by the abstract, evidence *aliunde* is not admissible to show that adverse claims have no foundation.[3] A purchaser will not be compelled to accept a title based on facts to be determined by parol evidence unless there is a certainty that the evidence cannot be contradicted.[4] The seller must be

App. Div. 440, 56 N. Y. Supp. 613; Sloane v. Martin, 24 N. Y. Supp. 661; Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99; Pell v. Pell, 169 N. Y. 607, 67 N. E. 1099. In the following cases the title was held so doubtful as to be unmarketable: Salesbury v. Ryon, 105 N. Y. App. Div. 445, 94 N. Y. Supp. 352; Clouse's Appeal, 192 Pa. St. 108, 43 Atl. 413; Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072; Montrose Realty & Improvement Co. v. Zimmerman, 73 Atl. 846; Rosier v. Graham, 146 Mo. 352, 48 S. W. 470; Fitzpatrick v. Sweeny, 56 Hun, 159, 9 N. Y. Supp. 219; Chambers v. Tulane, 9 N. J. Eq. 146; Paget v. Melcher, 42 N. Y. App. Div. 76, 58 N. Y. Supp. 913; Paret v. Keneally, 30 Hun, 15; Page v. Greely, 75 Ill. 400; Boggs v. Bodkin, 32 W. Va. 566, 5 L.R.A. 245, 9 S. E. 891; Lewis v. Herndon, 3 Litt. (Ky.) 358, 14 Am. Dec. 68; Smith v. Hunter, 241 Ill. 514, 89 N. E. 686, 132 Am. St. Rep. 231; Van Keuren, 66 Atl. 920; Lamprey v. Whitehead, 64 N .J. Eq. 408, 54 Atl. 803; Hocker v. Brown, 104 La. 524, 29 So. 532; Brown v. Cannon, 10 Ill. 174; McCabe v. Kenny, 52 Hun (N. Y.) 514, 5 N. Y. Supp. 678; Tevis v. Richardson, 7 T. B. Mon. (Ky.) 654; Noyes v. Johnson, 139 Mass. 463, 31 N. E. 767; Methodist Episcopal Church at Bound Brook v. Roberson, 68 N. J. Eq. 431, 58 Atl. 1056; Emens v. St. John, 79 Hun, 99, 29 N. Y. Supp. 655; Kursheedt v. Union Dime Sav. Inst., 118 N. Y. 358, 7 L.R.A. 229, 23 N. E. 473; Stevens v. Banta, 47 Hun (N. Y.) 329; Post v. Hazlett, 59 Hun, 621, 12 N. Y. Supp. 838; Warner v. Will, 5 Misc. N. Y. 329, 25 N. Y. Supp. 749; Simis v. McElroy, 60 Hun, 583, 15 N. Y. Supp. 19; Gardner v. Dembinsky, 52 App. Div. 473, 65 N. Y. Supp. 183; Fink v. Wallace, 47 Misc. Rep. 247, 95 N. Y. Supp. 872; Dixon v. Cozine, 114 N. Y. Supp. 615; In re Clarke, 131 App. 688, 116 N. Y. Supp. 101; Taylor v. Chamberlain, 6 App. Div. 38, 39 N. Y. Supp. 737; Priessenger v. Sharp, 59 N. Y. Super. Ct. 315, 14 N. Y. Supp. 317; Reynolds v. Strong, 82 Hun, 202, 31 N. Y. Supp. 329; Downey v. Seib, 102 App. Div. 317, 92 N. Y. Supp. 431, affirmed in 185 N. Y. 427, 8 L.R.A. (N.S.) 149, 78 N. E. 66, 113 Am. St. Rep. 926; Hilton v. Sowenfeld, 53 Misc. Rep. 152, 104 N. Y. Supp. 942; Weintraub v. Metzinger, 54 Misc. Rep. 156, 105 N. Y. Supp. 888.

[3] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217.

[4] Ruess v. Ewen, 165 N. Y. 633,

able to tender a marketable title. A purchaser ought not to be forced to take property, and then be obliged to defend its possession by litigation. "He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused, so where there is a defect in the record title which can be supplied only by resort to parol evidence, and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract." [5]

§ 1478. **Presumption of death from long absence.**— The presumption of death arising from the fact that a person has not been heard from for a long period of time is strengthened if, during such time, he possessed a valuable interest in property, which, in case he was living, he would, in accordance with human experience, have asserted and claimed.[6] A testator, having title to a lot, devised it to his son, on condition that he was not to dispose of the property or take possession of it until he should attain the age of thirty years, and providing that the mother should have possession in the meantime. Several years later the son went to the western states and disappeared. At the time of his disappearance he was not married. Forty-one years after his disappearance an action was brought for the partition of the property by his only heirs. A purchaser at the partition sale refused to

59 N. E. 1130, affirming 54 N. Y. Supp. 357, 34 App. Div. 484.

[5] Heller v. Cohen, (N. Y.) 48 N. E. 528. See, also, Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195; Shriver v. Shriver, 86 N. Y. 575; Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Irving v. Campbell, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; Holly v. Hirsch, 135 N. Y. 590, 32 N. E. 709; Rutherford Land & Imp. Co. v. Sanntrock, 44 Atl. 938.

[6] Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387.

consummate the purchase upon the ground that the death of the son intestate, unmarried, and without heirs other than those claiming as such, was not sufficiently proved. Her motion for a discharge was granted, but on appeal the order was reversed by the court of appeals which said that it thought that the objection to the title on the ground that the son, the devisee under the will, was not shown to be dead, or, if dead, that it was not shown that he died intestate, or left no widow or issue surviving, ought not to have prevailed. It said that the presumption of his death, intestate and without leaving a widow or children surviving was, upon the facts disclosed, "very strong, amounting to scarcely less than certainty." The court said that it could not be doubted that he knew of the devise to him and that the presumption of his death was not dependent simply upon the lapse of time but that if living he would have claimed his right and the court considered it scarcely conceivable that, if he had wife or children, he would not have informed them of his inheritance. The court stated that it was well settled that "a purchaser on a judicial sale is entitled to a marketable title,—that is, a title free from reasonable doubt; and courts are not disposed to compel a purchaser to take title where a doubtful question of fact relating to an outstanding right is not concluded by the judgment under which the sale is made." But the court added that the rule "is not absolute that a disputable fact, not determined by the judgment, is in every case a bar to the enforcement of the sale. It depends in some degree on discretion. If the existence of the alleged fact which is supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency which, according to ordinary experience, has no probable basis, the court may, I suppose, compel the purchaser in such a case to complete his purchase. It is needless to say that the discretion is to be carefully and guardedly exercised, and only where the case is free from reasonable doubt." The court

held that the objection of the purchaser was untenable and that according to the rules in equity he ought not to have been released from his purchase.[7] But if the title of the vendor depends upon the death of a person in the chain of title, and the only evidence of his death is the fact that twenty-four years before the trial of the action for specific performance he was a young, unmarried man, whose health was feeble and whose habits were dissipated, and he had left his home for unknown causes and since the time of his departure had not been seen or heard from, and his age, if still living, would be only forty-seven years,—the purchaser, when, no title by adverse possession is shown and where, by his contract, he is entitled to a first-class title, will not be compelled to accept a deed from the vendor.[8] The court, stating that the parties had contracted for a "first-class title," said: "They did not rely upon the agreement which the law would imply to that effect. They expressly stipulated for it. The consideration to be paid for the land was based upon it. And the court should not compel the defendant to execute the contract, unless it is clear, beyond a reasonable doubt, that he will receive what he contracted to buy. There must be some point of time, of course, when the presumption of death would arise, but we have been referred to no case in this state in which the presumption has prevailed where the absence was less than forty years." [9]

§ 1479. **Long course of dissipation on presumption of death.**—The purchaser at a sale under a judgment rendered in an action to partition real estate applied to the court to be relieved from his bid upon an alleged defect in title.

[7] Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387. See, also, McComb v. Wright, 5 Johns. Ch. 263; Re Protestant School, 31 N. Y. 587.

[8] Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195, 17 Am. St. Rep. 634.

[9] Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195, 17 Am. St. Rep. 634.

The property was owned by an intestate at the time of his death and the title passed to his children. All of those known to be living were made parties to the action. One of the children disappeared from home when he was twenty-nine years of age and at that time was an inebriate whose frequent and protracted dissipations had brought on serious organic diseases. His physician testified that he could not possibly survive for more than a year. Nothing had been heard from him for seventeen years, although numerous publications were made concerning his property. The father died four years after the disappearance of the son and the court held that it would be presumed that the son died before his father and the purchaser should be compelled to take the title.[1] The

[1] Cambreleng v. Purton, 125 N. Y. 610, 26 N. E. 907. The facts in this case were that the son between the years 1865 and 1870 was very intemperate and indulged in spells of very hard drinking at intervals of about every three months. He disappeared from home on such occasions and remained away from a week to a month and was generally prostrated on his return, and was in a very weak and nervous condition. In 1873, the family physician discovered that he was suffering from a number of organic diseases, caused by indulgence in excessive drinking such as chronic disease of the liver, congestion of the kidneys and valvular disease of the heart. On the advice of his physician he went in 1873 to the Binghamton Inebriate Asylum, and remained there for a time but returned contrary to the advice of his physician, and indulged after his return in frequent and prolonged debauches after one of these, occurring in 1874 he had a severe illness in which two violent hemorrhages of the stomach occurred. His kidneys, it was discovered, had become much worse, his liver was extremely congested, and the action of his heart was greatly disturbed. Two months later, he again disappeared, being away about the usual time, and when he returned was apparently more prostrate than ever before. It was the opinion of his attending physician that he might die at any moment, and that if he went upon another spree his death would be inevitable. The physician declared that he had never known of such severe hemorrhages of the stomach and was astonished that death was not caused by them. His legs said the physician, were badly swolen and the action of the heart was labored and intermittent caused by blood poisoning from the condition of the kidneys. The physician thought and informed the family that under the most favorable circumstances

court, while conceding that a purchaser will not be compelled to accept a title where a doubtful question of fact relating to an outstanding right is not concluded by the judgment under which the sale is made, said: "But this rule will not operate in every case to bar the enforcement of the sale. If the existence of the alleged fact which is claimed or supposed to constitute a defect in or cloud upon the title is a mere possibility, or the alleged outstanding right is but a very improbable or remote contingency, which, according to ordinary experience, has no probable basis, the court may, in the exercise of a sound discretion, compel the purchaser to complete his purchase. It has been well said that the discretionary power is to be carefully and guardedly exercised, and applied only in cases free from all reasonable doubt.[2] "But we think, from the undisputed evidence in this case, that the fact claimed to constitute the only defect in the title is such a very remote and improbable contingency, and is such a

he could not live for a year and gave instructions that it would be unsafe for him to go out of his room. The physician would not allow his sister to see him and expressed the opinion that if he should get away again he would not return alive. He was warned by the physician that another attack would probably prove fatal, but he expressed a desire to die as he could not control his passion for drinking. The following month, he was advised while seriously ill of the death of a lady to whom he had been attached, and it was reported, engaged. This information greatly affected him, and about two o'clock in the afternoon of that day he told his brother that he had some business to attend to down town, and would return in a couple of hours. He entered a Fifth Avenue stage wearing a one buttoned gaiter and a shoe leaving his valise packed in the house. At the time it was raining, and he was subjected to an exposure, which, according to the testimony of the physician and others, was apt to produce his death in a very short time. Nothing had been seen or heard of him since the time of his disappearance, though diligent inquiry and efforts to find him had been made by his family and friends.

[2] Citing Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 487; Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 22 N. E. 223; Insurance Co. v. Woods, 121 N. Y. 302, 24 N. E. 602.

slender possibility only, that it is a proper case for the application of the principle, and that the courts below were right in refusing to relieve the purchaser from the obilgations to perform his contract." [3]

§ 1480. **Conveyance not in chain of title.**—A conveyance from a person who never appeared to have any connection with the chain of title will not constitute a cloud, nor will a mortgage executed by strangers to the title. Such conveyances do not render the title unmarketable.[4] "It has been settled by a long line of decisions in this court," said Mr. Justice Wallace of California, "that if the title against which relief is prayed be of such a character as that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it constitutes a cloud which the latter has the right to call upon the court to remove and dissipate. If, on the other hand, the title be void on its face; if it be a nullity—a mere *felo de se,* when produced so that an action based upon it will 'fall of its own weight,' as has been said, then the title of the party plaintiff is not necessarily clouded thereby, and he might, if he would maintain an action to have it removed, show some special circumstances which entitle him, in the view of a court of equity, to a decree for that purpose." [5] As said by Chief Justice Field: "A conveyance not falling in the chain of title, as from one who never had any connection with the property, would not constitute a cloud upon such title. No action could be supported upon such a conveyance, even in the absence of rebutting proof, any more than upon

[3] Cambreleng v. Purton, 125 N. Y. 610, 26 N. E. 907. The court failed however to notice the case of Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195, 17 Am. St. Rep. 634, cited in the preceding section.

[4] Cummings v. Dolan, 52 Wash. 496, 100 Pac. 989, 132 Am. St. Rep. 986.

[5] Lick v. Ray, 43 Cal. 83.

so much waste paper." [6] Where a tenant in common owning an undivided half interest mortgages the whole interest, the mortgage does not constitute a cloud upon the title of his cotenant such as a court of equity will remove.[7] Mr. Justice Platt said that the rule is well settled "that when a defect appears upon the face of the record through which the opposite party can alone claim title there is not such a cloud upon the title as to call for the exercise of the equitable powers of the court to remove it. But when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title. The case of fraud in procuring a deed to be executed which apparently conveys the title, or the case of the sale of land by a sheriff and the execution of a deed to the purchaser after redemption, or a sale upon a paid judgment, is a familiar illustration of a case of the latter kind." [8]

§ 1481. **Comments.**—While it is undoubtedly true, as an abstract proposition, that a deed from a stranger to the title may be disregarded, as apparently he had nothing to convey, and, therefore, his deed could pass no interest, still

[6] Pixley v. Huggins, 15 Cal. 127.

[7] Ward v. Dewey, 16 N. Y. 519. It is not necessary that the title should be absolutely free from all suspicion or possible defect: Todd v. Union Dime Sav. Institution, 128 N. Y. 636, 28 N. E. 504.

[8] Ward v. Dewey, 16 N. Y. 519. See, also, Lytle v. Sandefur, 93 Ala. 396, 9 So. 260; Dunklin County v. Clark, 51 Mo. 60. "There is a vast distinction" said the court in Georgia "between a deed which purports to have derived its existence through the true owner of the original and paramount title, and a deed executed by one unconnected with, and an entire stranger to such title. There would be abundant reason to regard with apprehension a conveyance which, though really void because of some latent infirmity, bears apparently the stamp of force and validity, and assumes to trace its way through connecting links back to

there may be attendant circumstances which may be sufficient to put an intending purchaser upon inquiry and to charge him with notice. It may be that such inquiry would disclose that the stranger who had made the deed did have some interest, as, for instance, under an unrecorded conveyance. If the deed is made by a stranger to the title who is in possession of the property, the possession is sufficient to charge a purchaser with notice of the occupant's rights whatever they may be. Other facts may likewise give notice of his rights. When such a deed appears it will not be safe to disregard it without some inquiry as to whether other facts may not also exist, which, if the apparent stranger had any interest in the title, would charge a purchaser with notice of it.

§ 1482. **Destruction of records by fire.**—If the records of a county are destroyed by fire so that the vendor cannot give a title deducible of record, the purchaser may rescind the contract and recover back such portion of the purchase money as he may have paid prior to the destruction of the records. In order to decide whether the chain of title is perfect, the entire record must be set out. The fact that the fire did not destroy the general index of records cannot have the effect of supplying the evidence contained in the full records, and the only effect that they could possess is to furnish a clue to the records destroyed by the fire without giving any substantial information as to what they contained. Such a fire renders all titles unmerchantable until they are restored of record, as provided by an act of the legislature, authorizing the quieting of title against all persons. The fact that the value of the land sold has diminished since the fire and this is the motive that impelled the purchaser to

the fountain head from which flowed the original title. On the other hand, an instrument which springs from no definite source of right whatsoever can never properly be considered a cloud upon the title": Thompson v. Etowah Iron Co., 91 Ga. 538, 17 S. E. 663.

rescind is immaterial as he had a right to stand by the terms of his contract and to receive a perfect title of record.[9]

§ 1483. **Statute establishing burnt records constitutional.**—The Supreme Court of California held that the act providing for the establishing and quieting of titles to property in San Francisco to remedy the loss of the records by fire was constitutional. In speaking of what is a merchantable title the court through Mr. Justice Sloss said: "It is hardly necessary to point out, that under the system of registration of land titles which has grown up in all of the states of this Union it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice (whether or not the record remains in actual existence), the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. It is, of course, true that for many centuries lands have been transferred in England, whence we have, in the main, derived our system of real property law, without any considerable resort to a public recording scheme. But in this country the system of registration has become so completely established that the courts can take judicial notice of the fact that in the great majority of cases parties dealing in real estate rely for the proof of their titles upon the chain of title that will be disclosed by an examination of the records, and in a small degree, if at all, upon the possession of the orginal instruments composing that chain. In many instances, indeed, these instruments are not preserved for any great length of time." [1] A certain time was

[9] Crim v. Umbsen, 155 Cal. 697, 103 Pac. 378; Hooe v. O'Callaghan, 10 Cal. App. 567, 103 Pac. 175; Cabrera v. Payne, 10 Cal. App. 675, 103 Pac. 176.

[1] Title etc. Restoration Co. v.

"to be allowed for examination of the title" and that "if the title is not found valid or made so" within a limited time, the deposit was to be returned and that "if the title is found or made valid" within that time and the sale was not closed, the amount deposited was to be forfeited, and also that "the owner hereby binds himself upon receipt of the purchase money to deliver to" the purchaser, "a valid title to said property, but, if the title is defective, and it cannot be perfected within the time above specified, this contract will thereupon become null and void." The court held that the purchaser was entitled to a title fairly deducible of record and that if the official records have been destroyed by fire, the purchaser is not obligated to accept the title. The provisions in the contract are equivalent to calling for a perfect title, and when read in connection with the provision of an allowance for an examination of the title should be construed as "requiring a good title by the record." [2]

§ 1484. **Adverse possession.**—A marketable title it is generally considered may be founded on adverse possession.[3]

Kerrigan, 150 Cal. 289, 305, 8 L. R. A.(N.S.) 862, 88 Pac. 356, 119 Am. St. Rep. 199.

[2] Allen v. Globe Grain & Milling Co., 156 Cal. 286. In a case in Kentucky where the entire record of title was destroyed by the burning of the court house and its records, in a case for the specific performance of a contract for exchange of properties the court said: "If in fact, Calhoon's title be perfect, Belden is not bound to accept his conveyance without such proof of it as will arm him with the recorded means of vindicating its validity in after times, and there is no such proof, or even allegations in this case. He cannot, therefore, be entitled to a specific execution of the contract, but is equitably bound to take back the damaged lot and restore to Belden that which was exchanged for it. As the contract implied that perfect titles were to be interchanged and guaranteed, a rescission is the inevitable consequence in equity": Calhoon v. Belden, 3 Bush (66 Ky.) 674.

[3] Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Dickerson v. Trustees of Franklin St. Presbyterian Church, 105 Md. 638, 66 Atl. 494; Cherry v. Davis, 59 Ga. 454; Conly v. Finn, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399; Stevenson v. Polk, 71 Iowa, 278,

"Title by adverse possession is as high as any known to the law. A title which is as high as any known to the law should be, and we have no doubt is, open to no reasonable objection." [4] In a case in Massachusetts the court said that "if there was no title by deed, there is evidence to show a title by adverse possession, which is almost, if not quite, conclusive. We are not prepared to say that in no case would a purchaser be compelled in equity to take a title which rests on adverse possession. It has been held both in England and in America that a title by adverse possession may be so clearly proved and be so free from doubt, as to be a proper foundation for a decree for specific

32 N. W. 340; Beste v. McGaugh, 5 Penne. (Del.) 258, 63 Atl. 28; Gaines v. Jones, 86 Ky. 527, 7 S. W. 25; Thacker v. Booth, 6 S. W. 460; O'Connor v. Huggins, 113 N. Y. 511, 21 N. E. 184; Ford v. Schlosser, 13 Miss. Rep. 205, 34 N. Y. Supp. 12; Hammerschlag v. Duryea, 31 Miss. Rep. 678, 66 N. Y. Supp. 87; Kahn v. Mount, 46 App. Div. 84, 61 N. Y. Supp. 358; Wormser v. Gehri, 55 Miss. Rep. 147, 106 N. Y. Supp. 295; Freedman v. Oppenheim, 187 N. Y. 101, 79 N. E. 841, 116 Am. St. Rep. 595; Ruess v. Ewen, 34 App. Div. 484, 54 N. Y. Supp. 357, affirmed 165 N. Y. 633, 59 N. E. 1130; Clark v. Wollpert, 128 App. Div. 203, 112 N. Y. Supp. 547; Cannon v. Female Orphan Asylum, 24 La. Ann. 452; Neibaum v. Brennan, 49 La. Ann. 580, 21 So. 853; Safe Deposit & Trust Co. of Baltimore v. Marburg, 110 Md. 410, 72 Atl. 839; Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. Rep. 432; Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; Scannell v. American Soda-Fountain Co., 161 Mo. 606, 61 S. W. 889; Ocean City Assn. v. Creswell, 71 N. J. Eq. 292, 65 Atl. 454; Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 991; Miller v. Cramer, 48 S. C. 282, 26 S. E. 657; Maccaw v. Crowley, 59 S. C. 342, 37 S. E. 934; Dallmyer v. Ferguson, 198 Pa. 288, 47 Atl. 962; Nelson v. Jacobs, 99 Wis. 547, 75 N. W. 406; Levi v. Mathews, 145 Fed. 152, 76 C. C. A. 122; Erdman v. Corse, 87 Md. 506; Watkins v. Pfeiffer, 92 S. W. 562; Logan v. Bull, 78 Ky. 607; Parks v. Laroche, 15 Ill. App. 354; Cole v. Weyner, 32 W. Va. 277, 9 S. E. 30; Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483; Hedderly v. Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. Rep. 521.

[4] Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355, citing McWhorter v. Heltzell, 124 Ind. 129, 24 N. E. 743; Riggs v. Riley, 113 Ind. 208, 15 N. E. 253; Sims v. City of Frankfort, 79 Ind. 446; Wilson v. Campbell, 119 Ind. 290, 21 N. E. 893.

performance against the purchaser." [5] Under a contract requiring the seller to furnish a good and sufficient warranty deed, the purchaser is entitled to a good and marketable title but not to a perfect record title.[6] At the trial the defendant in an action for damages for failure to accept a deed requested the court to charge that: "The defendants, under the law and by their contract, are entitled to a good marketable title to the land, and every part thereof; and the plaintiff, having only attempted to show a title claimed to have been acquired by adverse possession for a period of fifteen years, a title which can be determined or established only by judicial inquiry and decision, dependent wholly upon facts resting in parol, has not shown such a title as his contract called for, or such as the defendants are bound to accept, and plaintiff cannot recover." The court below admitted that the defendants were entitled to a good and marketable title but said to the jury: "A marketable title is one of such character as to assure to the vendee a peaceable enjoyment of the property. If you find that the plaintiff and his father were in actual, visible, continuous, notorious, distinct, and adverse possession of the property sold to the defendants for a period of fifteen years and more prior to the time that the contract was made with the defendants, the plaintiff would be the absolute owner of the property. If you should find that these elements have been complied with, and that he has been in possession continuously by himself and his ancestors, he is the absolute owner of the property as much as though he had record title, and could convey such title as the defendants had a right to receive under this contract." The court on appeal held that there was no error in this charge.[7]

[5] Conley v. Finn, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399.

[6] Barnard v. Brown, 112 Mich. 452, 70 N. W. 1038, 67 Am. St. Rep. 432.

[7] Barnard v. Brown, *supra*. A purchaser will be required to accept a title where it appears that the owners of the property have been in possession of it without any adverse claim for more than ten

§ 1485. What degree of proof necessary to establish adverse possession.—There is no presumption of the existence of a disability to sue for the possession of land. Yet, if by the testimony of the vendor himself, a doubt is created on a material question as to whether, by reason of such disability, the statute of limitations had run in favor of the title which he had warranted, the vendee will not be obliged to accept a conveyance.[8] If the vendor claims title by adverse possession and has contracted to convey with warranty, he has the burden of proving not only possession for the requisite time but also that such possession matured into title.[9] Proof of uninterrupted possession for the statutory period will not be sufficient to compel a purchaser to accept a title founded on adverse possession, in the absence of proof that the legal owners were not under a disability during the period of adverse possession claimed, so that the statute would have run to bar their rights.[1] If the record title is insufficient, a title depending upon limitation, must, to be sufficient, be such as can be proved good as a matter of law, and not as depending on a question of fact.[2] If the vendor, when offering title, relies on title by the record alone, and did not claim nor offer proof of title by adverse possession, he cannot in an action for a breach of the contract to purchase, rely on title by adverse possession.[3] As the holders of the outstanding record title are not parties to an action to compel the purchaser to accept a conveyance, the purchaser, if compelled to accept the deed, may still be forced to litigate with the true owners the

years: Revol v. Stroudback, 107 La. 295, 31 So. 665.

[8] Baumeister v. Silver, 98 Md. 418, 56 Atl. 825.

[9] Wilhelm v. Federgreen, 157 N. Y. 713, 53 N. E. 1133, 38 N. Y. Supp. 8, 2 App. Div. 483.

[1] Carolan v. Yoran, 186 N. Y. 575, 76 N. E. 1102, affirming S. C. 93 N. Y. Supp. 935, 104 App. Div. 488, 16 N. Y. Ann. Cas. 339.

[2] Greer v. International Stock Yards, 43 Tex. Civ. App. 370, 96 S. W. 79.

[3] Simis v. McElroy, 160 N. Y. 156, 73 Am. St. Rep. 673, affirming 42 N. Y. Supp. 290, 12 App. Div. 434.

question of title and the case is different from that in which the proceeding is against the party in possession by one asserting a title shown by the record, as in such case the person in possession is in a stronger position to assert his right than when engaged in litigation with a stranger who declines to accept his title. "It might well be held to have the same effect in every case, but for the difficulty, if not impossibility, of establishing the fact as against those who are not parties to the action or bound by the judgment. In such cases it is frequently very difficult for courts to anticipate what the owner of the outstanding title may be able to prove in litigation with a party who has taken a title by adverse possession. The former may be able to prove facts tending to show that what appeared to be an adverse possession, in a litigation in which he was not heard, is quite otherwise, and hence this court has frequently refused to compel a purchaser to take a title which he may be called upon to defend by parol proof of adverse possession." [4] Where a deed to the vendors predecessor had omitted by mistake a narrow strip of land, but a building had been erected on the land covering the strip and had so remained for thirty years, continuosly and peaceably occupied by the owner in opposition to a presumption of ownership in any one else, there is no defect in the title.[5]

[4] Simis v. McElroy, 160 N. Y. 156, 73 Am. St. Rep. 673, affirming 42 N. Y. Supp. 290, 12 App. Div. 434.

[5] Weil v. Radley, 163 N. Y. 582, affirming 52 N. Y. Supp. 398, 31 App. Div. 25. See, also, as to the sufficiency of the proof to establish adverse possession: McAllister v. Harman, 101 Va. 17, 42 S. E. 920; Binzen v. Epstein, 172 N. Y. 596, 64 N. E. 1118, affirming 69 N. Y. Supp. 789, 58 App. Div. 304; Kahn v. Mount, 61 N. Y. Supp. 358, 46 App. Div. 84; Hammerschlag v. Duryea, 172 N. Y. 622, 65 N. E. 1117, affirming 66 N. Y. Supp. 87, 31 Misc. Rep. 678, 68 N. Y. Supp. 1061, 58 App. Div. 622; Moore v. Bush's Heirs, 6 Ky. Law Rep. (abstract) 670; Berryman v. Hisle, 4 Ky. Law Rep. (abstract) 620; Pope v. Thrall, 68 N. Y. Supp. 137, 33 Misc. Rep. 44; Miller v. Cramer, 48 S. C. 282, 26 S. E. 657; Forsyth v. Leslie, 77 N. Y. Supp. 826, 74 App. Div. 517; Forbes v. Reynard, 98 N. Y. Supp. 710, 113

§ 1486. Some states do not recognize adverse possession as giving marketable title.—While the general rule undoubtedly is as stated in the preceding section, yet in some states the principle is not adopted. In Washington it is held that a title is not merchantable where it is not deducible of record, but where parol evidence is required to show how a grantor in the chain of title acquired title. A merchantable title in that state is defined to be one "deducible of record reasonably clear from defects which affect its salability; one that does not require a purchaser to inquire outside of the record whether there are heirs or other persons whose rights may or may not be precluded by lapse of time. A merchantable title is such a title as a reasonably well informed and intelligent purchaser acting on business principles would be willing to accept." [6] Speaking of a title founded on adverse possession, Mr. Justice Fullerton in delivering the opinion of the court said: "It may be that appellant showed with reasonable certainty that this title was one capable of being defended. But this was not enough. Few persons care for that form of title which requires a resort to parol evidence to establish a link in its chain. And there is a well founded reason for such dislike. Other conditions being equal, property so held is always passed by when offered for sale in competition with property held by title deducible of record. Such a title is more subject to attack by speculators in defective titles than is a record title, and when attacked more difficulty is experienced in establishing it than is in establishing the latter form of title. Land so held cannot be left vacant with the same safety as land held by title of record, and it seems that no matter how incontestable the parol proofs of title may be, a constant resort to the courts is necessary to enforce rigths and contracts in connection

App. Div. 306; Foster v. Eoff, 19 Tex. Civ. App. 405, 47 S. W. 309; Fant v. Wright, 61 S. W. 514.

[6] Coonrod v. Studebaker, 101 Pac. 489; Cummings v. Dolan, 52 Wash. 496, 100 Pac. 989.

therewith which pass unquestioned with other forms of title. For these and other reasons such a title is undesirable and courts will not force it upon an unwilling purchaser who has contracted for a marketable title."[7] And in California it was held that the question whether the seller had acquired a perfect title by adverse possession was immaterial as the purchaser is entitled to "a good paper title sufficient in law, and was not bound to accept a title resting upon the statute of limitations, or take the risk of determining from facts which he might learn *dehors* the record whether or not the statute of limitations could be successfully pleaded against the adverse claim."[8]

§ 1487. Adverse possession and agreement to give good record title.—But if the vendor agrees to give a valid record title, such a title must be furnished to comply with the contract, and a title resting on adverse possession alone will not be sufficient. Title, by adverse possession, will not be sufficient where he agrees to furnish a complete abstract of title, showing a fee simple title in him.[8a] Thus where he contracts to sell land by warranty deed with abstract showing "good title" he must furnish such a title. "The title," said the court "may be good; but one to whom an abstract showing good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract. The vendee in such a case is not required to accept or rely on parol evidence of title or information *dehors* the records or the word of the vendor. That the title was not only to be good, but that the abstract was so to exhibit it, was a valuable consideration in entering into the agreement; for every one recognizes the superior salability of land with good paper title."[9] Where a contract provided that "said

[7] Wilson v. Boyle, 104 Pac. 146.

[8] McCrosky v. Ladd, 28 Pac. 216.

[8a] Thompson v. Dickerson, 68 Mo. App. 535.

[9] Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981. See, also, Boaz v. Farrington, 85 Cal. 535, 24 Pac. 787; Turner v.

conveyance is to be by warranty deed, with all liens and taxes discharged, a full abstract and deed to be subject to reasonable examination and approval by said Constantine," it was contended, on the one hand, that the purchaser was entitled to a good record title, and on the other that the contract did not stipulate for a good record title and that the vender might show a title acquired by adverse possession. The court said that "the only construction which could be placed upon the language used, without doing violence to the rules of language, is that appellees were to convey the property by a good and perfect title to the appellant. It can hardly be urged that the appellees agreed to give a warranty deed for property which they did not own, or to which they had no title. Can it be said, therefore, that they were to give a warranty deed for property to which they had but an imperfect title? Under the terms of this contract it was agreed that, if appellees could not convey to appellant a good and perfect title to said lands, the appellant should not perfect his earnest money. This meant more than merely to convey the land to him by warranty deed; it meant to vest in him a good and perfect title. If it was not necessary that the appellees possess a title in order to convey to the appellant there would be no necessity for an abstract. If there was to be an abstract at all, it was for the purpose of disclosing the title of appellees. If it did not disclose a record title, it would show nothing, for an abstract is simply a compilation in abridged form of the record of the title. When the appellees failed to furnish appellant with an abstract showing title in them, appellant was not bound to consummate the purchase unless we adopt such a construction of the contract as will make that part of it which provides for an abstract as meaningless. This we cannot do." [1] If the contract obligates the vendor "to give

McDonald, 76 Cal. 177, 9 Am. St. Rep. 189.

[1] Constantine v. East, 8 Ind. App. 291, 35 N. E. 844. See, also, Ben-

a clear abstract of title," he must furnish a good paper title and cannot require the purchaser to accept a conveyance where part of the title depends on adverse possession.[2]

§ 1488. **Tax titles.**—A marketable title may be based upon a tax deed if, by the statute, an absolute estate in fee simple is vested by the sale in the grantee. If in such a case there is no defect in the proceedings for the sale or in the tax deed itself, the title is marketable.[3] While a title is not marketable that is open to judicial doubt, still, as the court remarked, "what may be regarded as such doubt is not easily defined, depending much upon the discretion of the court."[4] But where a trustee under a mortgage purchases real estate on a foreclosure sale, the title thus acquired is not marketable, because the beneficiaries presumptively possess the right to set such a sale aside.[5]

§ 1489. **Tax deed as color of title.**—If a party agrees to furnish an abstract showing a good and merchantable title, and if the abstract supplied pursuant to the agreement shows some tax deeds in the chain of title, but does not show any judgment, precept or affidavit as a basis for these deeds, and if such deeds without a valid judgment, precept and affidavit are considered by the decisions of the courts in the state nothing more than mere color of title, then, in the absence of proof of possession and payment of taxes, so as to sustain a claim of title by limitation, the title contracted for has not been

son v. Shotwell, 87 Cal. 49; Sheehy v. Miles, 93 Cal. 288; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605; Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767; Brown v. Widen, 103 N. W. 158.

[2] Bruce v. Wolf, 102 Mo. App. 384, 76 S. W. 723.

[3] Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; Reeves v. Alter, 9 Sadler (Pa.) 412, 22 W. N. C. 34, 12 Atl. 551; Harding v. Tibbills, 15 Wis. 232; Kramer v. Ricke, 70 Iowa, 535, 25 N. W. 278.

[4] Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

[5] Priessenger v. Sharp, 27 Jones & S. 315, 14 N. Y. Supp. 372.

shown and specific performance of the contract will be refused.[6]

§ 1490. **Good title presumed to be given.**—An agreement to make a good title is implied in a contract for the sale of real estate and a purchaser is not obliged to accept a defective title unless he, with knowledge of its defects, agrees to take such a title. "His right to an indisputable title, clear of defects and incumbrances, does not depend upon the agreement of the parties, but is given by the law."[7] Every purchaser of land "has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him and probably take from him the land upon which money was invested. He should have a title which should enable him not only to hold his land but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."[8] Unless there is some stipulation to the contrary, a marketable title is presumed to have been the subject of the sale,[9] and when the term "good title" is used in a contract of sale a marketable title is intended.[1] The title tendered to the purchaser should not be one suggesting future litigation.[2] But while

[6] Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072.

[7] Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 22 N. E. 233, 12 Am. St. Rep. 844.

[8] Dobbs v. Norcross, 24 N. J. Eq. 327. A marketable title is presumed to be bargained for where there is no agreement to the contrary: Mulchnick v. Davis, 130 App. Div. 417, 114 N. Y. Supp. 997.

[9] Scudder v. Watt, 90 N. Y. Supp. 605, 98 App. Div. 228; Penfield v. Clark, 62 Barb. 584; Turner v. Walker, 82 N. Y. Supp. 340, 40 Misc. Rep. 379.

[1] Fagan v. Hook, 134 Iowa, 381, 111 N. W. 981, 105 N. W. 155. A contract to convey binds the vendor to give a marketable title: Weaver v. Richards, 144 Mich. 395, 6 L.R.A.(N.S.) 855, 108 N. W. 382; Howe v. Coates, 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 107 N. W. 397, 114 Am. St. Rep. 723.

[2] Carter v. Morris Building & Land Imp. Assn. Co., 108 La. 143, 32 So. 473.

a covenant is implied that the vender has a marketable title, there is no implied covenant that the title will be one which the grantee will accept or one which may be declared marketable by his attorney.[3] Where an undivided half interest is vested in a trustee, and the other half in an individual, a purchaser, even if he has no right to demand of the trustee any better title than that which he holds as trustee, has the right to a good title to the other half and to such title to the trustees interest as he is able to transfer.[4] If laches will prevent the assertion of claim, the title may be held marketable.[5] Where it is apparent from the contract between the parties, or accompanying circumstances, that they contemplated merely such a conveyance as would be sufficient to transfer all the title held by the vendor, whether good or bad, the purchaser can insist upon obtaining nothing more.[6]

§ 1491. **Record showing breach of trust.**—If a trustee acts in the double capacity of buyer and seller of the property, his title is voidable by those whom it was his duty to protect. If the purchaser has ascertained the facts, he is not a purchaser in good faith. Where, in a suit to compel a purchaser to complete the purchase, it appeared that the receiver claimed under two deeds, one from an executor having power under the will to sell, to a third person bearing the same family name, as the executor, and the second four days later by the grantee in the first deed conveying the property back to the executor individually, both deeds being recorded with an interval of only five minutes between them, and it did not appear that any accounting or settlement of the estate had been had, and there was no proof of a ratification of those interested under the will and no explanation was given by the receiver, the

[3] Green v. Ditsch, 143 Mo. 1, 44 S. W. 709.

[4] McAllister v. Harman, 101 Va. 17, 42 S. E. 920.

[5] Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Kip v. Hirsh, 103 N. Y. 565, 9 N. E. 317; First African M. E. Soc. v. Brown, 147 Mass. 296, 17 N. E. 549.

[6] Morgan v. Eaton, 52 So. 305.

court held that the conveyances showed that they were parts of one transaction and therefore the title was defective, as it might be avoided by the beneficiaries under the will.[7] But if a mortgagee purchases at a foreclosure sale, under a purchase money mortgage, a purchaser from him, paying full value and acting without collusion, will secure a good title, even when his wife died seized of the equity of redemption, leaving surviving her the husband and children, where none of the survivors were able to discharge the accrued interest on the mortgage and thus prevent a sale and where the property was not worth more than the amount of the judgment.[8] *A bona fide* purchaser without actual or constructive notice of any fraud will be protected.[9]

§ 1492. Giving wrong reason for objection.—If the vendee objects to fulfilling the contract to purchase, on the ground that the abstract furnished did not show a good merchantable title in the grantor, and specifically objected to a certain clause in a deed in the vendor's chain of title, he will not be held to have waived the objection for the reason that he assigned a wrong ground for it, if the clause to which he objected actually created a trust in favor of a stranger.[1] In a deed appearing in a chain of title was the clause, "upon condition that grantee assumes and pays all debts, claims and obligations owing by said Russell Dow, deceased, with necessary cost of administration of estate." The court held that

[7] People v. The Open Board of Stock Brokers Building Co. etc., 92 N. Y. 98. For other cases where the courts have held that sales might be set aside on account of a breach of duty by a trustee or guardian, see Williams v. Schembri, 44 Minn. 250, 46 N. W. 403; Elliott v. Tyler, 3 Pa. Cas. 584, 6 Atl. 917; Ford v. Wright, 114 Mich. 122, 72 N. W. 917; Morrison v. Kinstra, 55 Miss. 71; Collins v. Smith, 1 Head. 251; Howell v. Donegan, 74 Hun, 410; Tillotson v. Gesner, 33 N. J. Eq. 313.

[8] Kullman v. Cox, 167 N. Y. 411, 53 L.R.A. 884, 60 N. E. 744.

[9] Nicholson v. Condon, 71 Md. 620, 18 Atl. 812; Levy v. Iroquois Bldg. Co., 80 Md. 300, 30 Atl. 707.

[1] Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072.

this clause did not create a condition subsequent, but did create an express trust in favor of the creditors of Russel Dow, binding upon the grantee and all subsequent purchasers with notice. "The authorities seem to be unanimous," said the court, "that where a conveyance is made of real estate upon condition that the grantee shall pay a specified sum of money to a third person or pay the debts of the grantor or of some third person, the acceptance of the conveyance by the grantee with such clause in the deed creates a covenant on the part of the grantee to discharge the obligation imposed, and creates the relation of trustee and *cestui que* trust between the grantee and the persons for whose benefit the payment is to be made, without any act or assent on the part of the beneficiary." The court held that this trust being expressed in a deed, found in the chain of title, followed the land into the hands of subsequent grantees, and that when an abstract was tendered less than four years after the deed was executed it could not be said "as a matter of law that creditors of Roswell Dow would be barred by limitation or laches by the lapse of time. There is no showing in the abstract or exhibits submitted therewith that there were no debts against Roswell Dow's estate or that, if there were any, they had been paid. The only showing is that the estate of Roswell Dow had been settled and the administratrix discharged. This might well be, and still the debts of the estate remain in part or wholly unpaid. Appellee was not required to accept a title under his contract unless it was free from doubt. We see no reason why, if there were creditors of Roswell Dow's estate, they might not maintain a bill to subject this land to the payment of such debts. Under such circumstances appellee was not required to accept the title." [2]

[2] Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072, citing 3 Pomeroy's Eq. p. 1405, and cases there cited: Snyder v. Spaulding, 57 Ill. 480; Hoyt v. Tuxbury, 70 Ill. 331; Close v. Stuyvesant, 132 Ill. 607, 3 L.R.A. 161, 24 N. E. 868; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27.

§ 1493. **Possibility of woman of advanced age bearing children.**—Whether there is any age at which the child-bearing capacity of a woman ceases is not settled by the authorities. In Pennsylvania, the court held that the law as expressed by Blackstone, that the possibility of issue is always supposed to exist in law even though the donee be a hundred years old,[3] was settled, and that it had never been questioned in that state. The court declared that: "Any conjecture based on age is too doubtful and uncertain to result in any reliable conclusion." The contention was made that the doctrine of possibility of issue is only applicable after possibility of issue is extinct and that it is simply "a presumption governing the devolution and quality of estates, and that it should not be presumed when the facts show it to be impossible." But to this contention, Mr. Justice Mercur, delivering the opinion of the court, returned the answer: "This argument is fallacious. The very question before us is whether the possibility of issue is extinct. It affects the transmission of the estate. It diminishes the interests which the children now living may take. The presumption of law is in favor of issue, notwithstanding advanced age. It is a presumption of law on the very fact which we are requested to say destroys the presumption. The argument makes a conjectural conclusion rest on a fact, when the law declares no such conclusion shall be deduced from the fact."[4] A testator devised land to his daughter to be held by her husband in trust for her children, and in a codicil provided that the devise was intended and should give "to her children, living at her death, and to the lawful issue of any of them, if dead, in right of such one deceased, and to their heirs forever, the real estate so devised, and for want of such issue living, then that the real estate so devised" to his daughter should "go to and vest in her husband during his natural life." The daughter had two children at the date of the will, one of whom

[3] 2 Black Com. 125.

[4] Rodney, 83 Pa. St 492.

subsequently died without issue. Two children were also born after the date of the will, one of whom died without issue. The two surviving children, both unmarried and *sui juris,* and their mother (the testator's daughter) and her husband contracted to sell the land, and at the time that the contract was made both the testator's daughter and her husband were over seventy-five years of age. The purchaser refused to accept the title as unmarketable and the court said that if other children should be born to the testator's daughter they would be entitled to a share in the estate, and that the law would not consider the physical impossibility of her bearing children on account of her advanced years, and, hence, the title was not marketable.[5] Partition proceedings will not bar contingent interests given by a will to persons now living and others yet unborn, unless the interests of those unborn are submitted to the court, and a representative is appointed to act for them, or they are protected by such owners as equity and justice may require.[6] In a case in New York the court decided that where a contract provided for the sale of an undivided interest in remainder, and the parties to the contract knew that the title of the vendor depended wholly upon the death, without issue, of the life tenant, who was a childless woman seventy years of age, they must be held to have entered into the contract with that understanding. The court also held that the probability of such life tenant having issue so as to defeat the estate of the vendor was too slight to render the vendor's title unmarketable so as to afford a justification for the purchaser's rejection of it.[7]

[5] List v. Rodney, 83 Pa. St. 492.

[6] Holmes v. Woods, 168 Pa. St. 530, 32 Atl. 54.

[7] Bacot v. Fessenden, 115 N. Y. Supp. 698, 130 App. Div. 819. Mr. Justice Lassing, who wrote the opinion said, in a case in Kentucky, involving the construction of a will where a woman was fifty-five years of age: "When this will was written, in 1901, the testator refers to one of his daughters as Sallie Marsh. Between that date and the death of her father, which occured prior to March 15, 1906, she had evidently married one Barnett; and

§ 1494. **Contingent interest bound by judgment in suit to quiet title.**—The decision of the court in an action to determine the title to real property, when all parties are before the court, is conclusive as to the condition of the title and binds all contingent interests in the property. The owners of a lot conveyed it to their daughter "to have and to hold the same for and during her natural life, without power of alienation, and after her death, to her heirs, and assigns forever." The daughter had one child, a daughter, who also had one child, a daughter. The grantor died leaving surviving children and children of deceased children. The purchaser of a tax title brought an action against the grantee in the deed and her husband to recover possession of the lot and obtained a judgment in her favor. He subsequently brought an action to quiet his title against the grantee, her husband, daughter and granddaughter, and secured a judgment declaring that he was the sole owner of the lot and that none of the defendants had any interest in the lot. A purchaser of the lot who had paid a portion of the purchase money sued to recover it on the ground that the title was not perfect because the deed created a contingent remainder in the heirs of the

since the institution of this suit, while it is not so stated, yet it appears from the record that she married again, because the suit is styled, upon this appeal, 'Sallie Barnett Allen v. Sallie Barnett Allen's Trustee.' Whether or not the trustee is her husband is not disclosed by the record. It is argued that she will have no more children. She may not. She is fifty-five years of age. But being married, it is not beyond the pale of possibility that she may have other children; and while such possibil- exists, the chancellor should not put it beyond his power to protect the rights of any child or children that might yet be born to her. In United States Fidelity and Guaranty Co. v. Douglas, Trustee, 134 Ky. 374, 120 S. W. Rep. 328, in passing upon a similar question, it is said: 'But this court has never fixed a period in a woman's life beyond which she might not have children, and, in fact, it was specifically declared in Brown v. Columbia Trust Co., 123 Ky. 775, that no age limit would be fixed beyond which the court would feel justified in declaring that a woman would not and could not give birth to a child.'" Allen v. Allen's Trustee, 133 S. W. 543.

grantee, and that, therefore, until her death it was uncertain who would be entitled to the remainder. The vendor claimed that his title was perfect because all persons who might claim title under the deed to the grantee were bound by the judgment. Mr. Chief Justice Start, in delivering the opinion of the court, said that conceding, without so deciding, that the deed in question vested in the grantee only a life estate in the lot and created a contingent remainder as claimed, "still the district court had power to acquire jurisdiction over all parties interested in the contingent remainder, and by its decree determine their rights. This conclusion necessarily follows from the equity doctrine that the general rule that only those who are parties to a suit are affected by the decree is subject to the exception that where the subject-matter of the action is the determination of the title to real estate, if all parties are brought before the court that can be brought before it, and it acts on the property according to the rights that appear, there being no fraud or collusion, its decision is conclusive as to the state of the title, and binds all contingent interests in the real estate. In such a case it is sufficient to bring before the court the first tenant in tail in being, and, if there be none, the first person entitled to the inheritance, and, if there be none, then the tenant for life, for all other parties who may at any time claim a contingent remainder or other contingent estate are bound, upon the principle of representation, by the decree adjudging the title. The rule is based upon necessity, for it would be intolerable injustice if the owner of real estate could not have his title quieted where there was a claim of an outstanding contingent remainder which might possibly vest in persons not then in being." [8] The court said that it had never been determined by it whether the statutory action to determine adverse claims is strictly a legal or an equitable action, but that it has been recognized

[8] Mathews v. Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558.

as an equitable action as distinguished from an action at law. "The purpose of the statute in giving the action," said the court, "is to afford an easy and expeditious mode of quieting title to real estate. This result is secured by enlarging the power of the court to determine adverse claims to land and to quiet the title thereto in cases where, by the strict rules of a court of equity, no action could be maintained to quiet title and remove clouds thereon. It logically follows that the action, although a statutory one, is substantially an equitable one, unless the issues made by the answer and reply are strictly legal ones, and that, except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to such action." [9]

§ 1495. **Decree of distribution of probate court.**—If a decree of distribution is made by a probate court which is conclusive upon all parties interested, a doubt as to the construction of the decree will not render a title unmarketable. Such a decree binds all persons interested whether they are then in being or not, as it is in the nature of a judgment *in rem*. A title is not unmarketable where the question is one of law solely as to the construction of a record muniment of title. It was contended that the rule as to the conclusive force of the decree did not apply to persons who were not born at the time when the decree was rendered, as such persons were not parties to the proceedings either in person or by representation and hence not bound by it. But the court held that if the court had jurisdiction of the estate its decree was as conclusive as a decree in admiralty or any other judgment *in rem*. There is no difference in principle, the court held, between the case of persons who are under disability and persons yet unborn, and the logic of the contention made "would be equally applicable to any other decree or order of the pro-

[9] Mathews v. Lightner, *supra*. See, also, Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942.

bate court affecting the estate of the testator, as, for example, admitting his will to probate; and the result would be that nothing could ever be conclusively determined as to the estate of a deceased person, for often it could not be positively assured that some person might not afterwards come into being who would be interested in the estate." The point was made that although the title tendered may have been good in fact, yet it was involved in so much legal doubt as to be unmarketable, and therefore the purchaser was not bound to accept it. But the court said that the title did not depend upon matters of fact not of record, but rested wholly upon record evidence. "Hence the doubt, if any," said the court, "was one purely of law, as to the construction and effect of these records. If the insufficiency of the title had depended upon the construction of the will, it would have been unquestionably doubtful and unmarketable. But it wholly depended upon the effect of the decree of distribution. The mere fact that laymen, or even some lawyers, may have some doubt as to the conclusiveness of the decrees of the probate court upon persons not in being who may be interested in the estate of a deceased person, was not such a doubt as to render the title unmarketable in any legal sense, or constitute any ground for a court refusing specific performance." [1]

[1] Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99. The court further said: "The only possible legal doubt worthy of consideration, is as to the sufficiency of the decree of distribution, in form and substance to constitute an assignment of the whole estate in the property to the devisees named. Generally, where courts have refused to compel specific performance on the ground of doubt on a question of law arising upon the construction or legal effect of record muniments of title, it has been where not only was the doubt a grave one, but where there were interested parties not before the court, and consequently not bound by its decision, who might afterwards subject the vendee to vexations and expensive litigation. Except under such circumstances, the courts have usually construed the records for themselves, and granted or refused specific performance according as they found the title good or bad. A title cannot be considered doubtful where there is no question of fact involved in a

§ 1496. **Construction of documents.**—Where the meaning of an instrument in the chain of title is in doubt from an inability to determine the meaning of its language, the title is too doubtful to be marketable.[2] But if the title depends upon a question of law and that question has been settled by decisions, the doubt is not well founded.[3] A title may be unmarketable because the proper construction to be given to a will is doubtful. Speaking of a will, Vice Chancellor Grey said that it was so inartistically drawn "that it is difficult to put any construction upon it which will not leave the vendee, if he is decreed to perform his agreement and take title under it, in danger of losing the property conveyed at the suit of some future claimant. The decree in this suit, even if favorable to the complainant, would, of course, afford no protection to the defendant against the attack of any claimant of the lands in dispute who is not a party to this suit. The doubt as to the complainant's power to convey the lands, if it is not resolved against her, must at least be admitted to be so forceful that her right is fairly debatable. This is sufficient to defeat her attempt to compel specific performance." [4]

decision as to its validity, but one of law only upon which the court where the controversy is litigated is competent finally to pass: Chesman v. Cummings, 142 Mass. 65, 7 N. E. 13."

[2] Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Jeffries v. Jeffries, 117 Mass. 184; Paulmier v. Howland, 49 N. J. Eq. 364, 24 Atl. 268; Zane v. Weintz, 65 N. J. Eq. 214, 53 Atl. 452; Cornell v. Andrews, 35 N. J. Eq. 7.

[3] Fairchild v. Marshall, 42 Minn. 14, 43 N. W. 563; Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 68 Atl. 240; Chesman v. Cummings, 142 Mass. 65, 7 N. E. 13; Street v. French, 147 Ill. 342, 35 N. E. 814; Ludlow v. O'Neil, 29 Ohio St. 191; Lippincott v. Wikoff, 54 N. J. Eq. 107, 33 Atl. 305; Ebling v. Dreyer, 149 N. Y. 460, 44 N. E. 155.

[4] Zane v. Weintz, 65 N. J. Eq. 214, 55 Atl. 641. As to cases where the construction of wills has been involved, see Fisher v. Eggert, 64 Atl. 957; Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Butts v. Andrews, 136 Mass. 221; Cunningham v. Blake, 121 Mass. 333; Bearns v. Mela, 10 N. Y. Supp. 429; Kilpatrick v. Barron, 125 N. Y. Supp. 751, 26 N. E. 925; Lowry v. Muldrow, 8 Rich. Eq. 241; Batchelder v. Macon, 67 N. C. 181.

§ 1497. **Power of sale.**—Where a title is based upon a power of sale, a doubt may arise either as to the construction of the power or as to the existence of facts necessary to justify its exercise.[5] A will contained a provision authorizing the executors to sell real estate reading: "And they may sell or mortgage any of my real estate, at any time it may become necessary to do so, to pay any expenses or bequests herein provided for; or for the purpose of saving or improving any other portion of my said property while the same is undistributed." The court declared that this power to sell was not absolute or unconditional and could be exercised only for the purposes expressly named. "If the conditions existed calling for the exercise of the power, then undoubtedly the executors might exercise a reasonable discretion as to the mode and circumstances of its exercise, though they would be required to act with good faith and reasonable prudence in the fulfillment of the trust. But whether or not the conditions named exist under which they may exercise the power must be a question of fact, and not of discretion. No estate in the land was granted to the executors in trust or otherwise, but a naked power of sale only. They have no general power to convert real into personal property, and hence, if the necessity for making any sale arose, they would not be authorized to sell property of an amount and value grossly in excess of that necessary to be sold to realize the sum needed." The court held under the circumstances as shown in the case that it was not

[5] Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 41 N. W. 1056, 12 Am. St. Rep. 756; Paget v. Melcher, 42 N. Y. App. Div. 76, 58 N. Y. Supp. 913; Salisbury v. Ryon, 105 N. Y. App. Div. 445, 94 N. Y. Supp. 352; Holly v. Hirsch, 135 N. Y. 590, 32 N. E. 709; Paret v. Keneally, 30 Hun, 15; Chambers v. Tulane 10 N. J. Eq. 146; Abbott v. James, 111 N. Y. 673, 19 N. E. 434; Clouse's Appeal, 192 Pa. St. 108, 43 Atl. 413; Hall v. Rich, 59 N. J. Eq. 492, 45 Atl. 969; Leeds v. Sparks, 8 Del. Ch. 280, 68 Atl. 239; Cruikshank v. Parker, 52 N. J. Eq. 310, 29 Atl. 682; Zabriskie v. Morris, etc. R. Co., 33 N. J. Eq. 22.

clear that the executors were authorized in making a sale for the price offered or in selling a tract so large as that sold, and hence a title based upon a contract by them to sell was not marketable.[6] Where the owner placed on record a deed of trust for the benefit of his wife and daughter for life, and then to the heirs, giving a power of sale to the wife and daughter, but the grantee and trustee declined to accept the trust, executing a deed of release to the owner in which the wife and daughter joined the question became doubtful whether a trust had been created in favor of the heirs of the wife and daughter. This doubt, it was held, was sufficient to excuse a purchaser contracting for a good and sufficient title from performance.[7] A title is not marketable where litigation is required with grantees of various lots conveyed according to a map, embracing the tract to be sold and showing streets upon it to determine their rights in the streets.[8]

[6] Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 41 N. W. 1056, 12 Am. St. Rep. 756.

[7] Chauncey v. Inhabitants of Leominster, 172 Mass. 340, 52 N. E. 719.

[8] Koshland v. Spring, 116 Cal. 689, 48 Pac. 58. See, also, as to particular cases depending upon facts, Griffith v. Maxwell, 63 Ark. 548, 39 S. W. 852; Loring v. Whitney, 167 Mass. 550, 46 N. E. 57; Letchworth v. Vaughan, 77 Ark. 305, 90 S. W. 1001; Whelan v. Rosseter, 1 Cal. App. 701, 82 Pac. 1082; McGuire v. Blanchard, 107 Iowa, 490, 78 N. W. 231; Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969; Bard v. Grundy's Devisees, 2 Ky. (Ky. Dec.) 168; Cowan v. White, 2 Ky. (Ky. Dec.) 153; Begley v. Combs, 27 Ky. Law Rep. 1115, 87 S. W. 1081; Williams v. Porter, 7 Ky. Law Rep. (abstract) 533; Hecker v. Brown, 104 La. 524, 29 So. 232; Allendorff v. Gaugengigl, 146 Mass. 542, 16 N. E. 283; Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; Platt v. Newman, 71 Mich. 112, 38 N. W. 720; Kimball v. Goodburn, 32 Mich. 10; Ford v. Wright, 114 Mich. 122, 72 N. W. 197; Walker v. Gillman, 127 Mich. 269, 86 N. W. 830; Smith v. Busby, 15 Mo. 388, 57 Am. Dec. 207; McNellis v. Hilkowski, 98 Minn. 127, 107 N. W. 965; Meyer v. Madreperla, 68 N. J. L. 258, 53 Atl. 477, 96 Am. St. 536; Newberry v. French, 98 Va. 479, 36 S. E. 519; Moot v. Business Men's Inv. Ass'n, 157 N. Y. 201, 45 L.R.A. 666, 52 N. E. 1; Penfield v. Clark, 62 Barb. 584; Marine Wharf & Storage Co. v. Parsons, 49 S. C. 136, 26 S. E. 756; Christian v. Cabell, 22 Gratt.

§ 1498. **Decree of court cannot operate beyond state.** —A state cannot prescribe the mode in which land situated out of the boundaries may be conveyed, nor can a decree of the court of one state operate beyond that state. A deed was executed by a commissioner acting under a decree of court in Kentucky to land situated in Ohio. The statute of the latter state contained a provision that "all deeds, mortgages, and other instruments of writing for the conveyance of lands, tenements and hereditaments, situate, lying, and being within this state, which hereafter may be made and executed and acknowledged in any other state, territory, or country, agreeably to the laws of such state, territory, or country, or agreeably to the laws of this state, such deed, mortgage, or other instrument of writing, shall be valid in law." It was contended that the deed executed under the decree, by force of a statute of Kentucky was a legal conveyance in that state, and as such was good by the statute just quoted in Ohio. But Mr. Justice McLean, of the Supreme Court of the United States, declared that the deed executed by the commissioner must be considered as forming a part of the proceedings in the court of chancery, and that no greater effect could be given to it than if the decree itself was made by statute to operate as a conveyance in Kentucky as it did in Ohio. He said that the question "then arises whether, by a fair construction of the above provision, it is in the power of a court of equity sitting in Kentucky by force of its decree to transfer real estate in Ohio. Can this effect be given to such decree by this statute? It is believed that no state in the Union has subjected the real property of its citizens to the exercise of such a power. Neither sound policy nor convenience can sustain this construction, and unless the language of the statute be imperative, no court could sanction it. The Legislature of Ohio could never have intended by this provision to place the real property of the citizens of that state at the disposition

82; Foster v. Eoff, 19 Tex. Civ. App. 405, 47 S. W. 399.

of a foreign court. The language used in the act does not require such a construction. It refers to deeds executed by individuals in any other state; and not to conveyances made by the decree of a court of chancery. This is the true import of the section, and it does not appear that the courts of Ohio have given it a different construction. Thus construed, it promotes the convenience of nonresidents who own lands in Ohio, and may devise to convey them; and in no point of view can it operate injuriously to the interests of citizens of the state."[9] In a case where the title of the vendor was based upon a deed executed by a foreign assignee by an order of court of one state, but before the action to recover money paid on the contract was tried the vendor obtained judgment to quiet title, securing service against the foreign assignor, the assignee and the person to whom the assignee had conveyed by publication, the court held that the title was so doubtful that the court would not compel him to accept it.[1]

§ 1499. **Misnomer of grantee.**—In the chain of title a deed was made by the then owner to *George* F. Terschuren and no conveyance appeared from him. But a month later a conveyance was made by the same grantor to *Gerhard* F. Terschuren, which contained the recital: "This deed is made to correct a deed to George F. Terschuren, dated April 10th, 1899, recorded May 4th, 1899, to correct error in grantee's name." The subsequent purchaser, with Gerhard F. Terschuren as coplaintiff, commenced a suit against the administrator of the grantor alleging the making of the deed in his lifetime to George F. Terschuren, that it was made to *George* by mistake, and that the true name of the grantee was *Gerhard* instead of *George,* and that there was no such person as George F. Terschuren. The administrator defendant filed an answer

[9] Watts v. Waddle, 6 Pet. 389, 8 L. ed. 437, affirming 29 Fed. Cas. No. 17,295, 1 McLean, 200.

[1] McNutt v. Nellans, 82 Kan. 424, 108 Pac. 834.

denying the allegation of the complaint and a decree was entered finding the facts to be as alleged in the complaint and adjudging that the deed made by the grantor, deceased, to George F. Terschuren was made by mistake and that the deed should be reformed by inserting the name of Gerhard instead of George, and that the deed when so reformed should be a conveyance to the same effect as if made by the grantor to Gerhard F. Terschuren. The court held that the deed so procured did not cure the defect in the title and said that the suit was not a proceeding *in rem* and that George F. Terschuren was not made a party and hence the suit did not affect him and that it was plain that if the grantor could not in his lifetime correct the first conveyance made by him, his administrator could not do so. The purchaser was entitled "to a title fairly deducible of record, free from reasonable doubt or litigation. He was not required to accept a title depending upon matters which rest in parol." [2]

§ 1500. Misnomer in name of grantor in record.— Parol evidence, it is held, may cure or remove defects in the record title. It appeared by the records that an owner of land had executed a deed of it to Electa "Wilds," and that Electa "Wilder" had subsequently executed a deed for the same land to one Snashell. These deeds were in the chain of a vendor's title and it was asserted that the title was defective because the records did not show that the land had been conveyed by Electa "Wilds" as it could not be inferred from the records that she and Electa "Wilder" were the same person. The court said, that it was probably true, considering the record alone, there was such a defect in the vendor's title that the purchaser would not be compelled to accept it, as the two names are so dissimilar that they do not present a case of *idem sonans*. Yet the inference from the record was strong, the court stated,

[2] Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315. See, also, Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

that the two names stand for the same person. "They show title in Electa Wilds and not in Electa Wilder. The Christian name, not a very common one, and all the letters of the surname but two are the same and there is no conveyance in the name of Electa Wilds. If the two names do not stand for the same person, we have the case of an entire stranger to the title with a name quite similar conveying the title and passing it on through the chain to the plaintiff. The title was held and the land occupied without dispute under the deed from Electa Wilder for fourteen years. The vendor also proved that there was a mistake in the record. The deed to Snashell had been destroyed after he had conveyed the title, but the mortgage given back by him for the purchase money was produced and in that document Electa Wilds was named as the mortgagee. The commissioner of deeds who drew the deed and took the acknowledgment of the grantor testified that the grantor was Electa Wilds, and Snashell, the grantee in such deed, testified to the same effect. It was evident that the final letter in "Wilds" was so written that it was mistaken for an "r" by the recording officer." Mr. Justice Earl in delivering the opinion of the court said: "The whole evidence left the case free from any reasonable doubt that the plaintiff's deed would convey a good title, and hence, notwithstanding the apparent defect in the chain of title as shown by the records, the defendant could not justly refuse to perform his agreement. A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him; nor is it sufficient for him, when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the record

title may, under certain circumstances, furnish a defense to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence." [3]

§ 1501. **"Condition" used instead of "consideration."** —The owner of land devised the same to his daughter "upon condition" that she pay to her mother a certain sum annually, which annual payment was made a charge upon the land. But the will contained no provision for the forfeiture of the title nor was any devise ever made to the widow or to any one else in the event that the daughter made default in payment. The court decided that the word "condition" was used in the will in the sense of "consideration" and that the title devised was not conditional but was merely incumbered with an annual charge, and that in case of default the remedy would be a foreclosure of the lien and not a forfeiture of the land. Interpreting the will in this manner the court said that it was plain, beyond serious controversy, that the chain of title, aside from the lien, was good and marketable.[3a]

§ 1502. **Misdescription of property.**—It may appear by the internal evidence of the deed, the language used, and the monuments, courses, and distances to which the deed refers, that the parties intended to use one word of the description for another and if the court can ascertain the intention of the parties it will reject any particular call which is inconsistent with the other parts of the description, if, after such rejection, there is sufficient left to locate the land that the grantor intended to convey. Thus the land was described as

[3] Hellreigel v. Manning, 97 N. Y. 56.

[3a] Ditchey v. Lee, 167 Ind. 267, 78 N. E. 972.

beginning a certain distance from the *southeasterly* corner of certain streets. The grantor had title to property which would be included in the description if the word "southeasterly" should be changed to "southwesterly." The grantee in that deed, in selling, described the land conveyed to the vendor by the correct description. The vendor contracted to sell the land but the purchaser refused to accept the deed on the ground of defect in the title. The court held that the description contained abundant evidence of the words which the draftsman intended to use, and while it said it was not unmindful of the rule which excuses a vendee from accepting a title which is of doubtful validity, was of the opinion that it was removed from that category.[4] But the court cannot disregard an error in the description, unless the deed contains a sufficient description not only to indicate the property intended to be conveyed, but also to show that an error exists which can be disregarded and identification of the property still clearly can be made.[5]

§ 1503. **Where all parties affected are before the court.** —If all parties are before the court so that the court may adjudicate their claims, it cannot be said that a title so declared is subject to future litigation. When, in an action for specific performance, resistance was made on the ground of defect in the title, it appeared that the land was originally owned by a married woman as her separate estate and was conveyed by her and her husband to A, who conveyed it to B, the vendor and plaintiff in the suit for specific performance. The deed from the husband and wife to A recited a consideration of one dollar, and, on this, the vendee, defendant in the suit for specific performance, founded his objection that the consideration expressed was not a valuable one but was

[4] Brookman v. Kurzman, 94 N. Y. 272, 66 How. Pr. 237.

[5] Heler v. Cohen, 154 N. Y. 299, 48 N. E. 527, reversing 9 N. Y. App. Div. 465, 41 N. Y. S. 214. See, also, Smith v. Turner, 50 Ind. 367.

merely formal. The husband and wife, however, were made parties to the action and filed their answer ratifying the original deed and disclaiming any interests in the land. The court held that the vendor was invested with a perfect title, so far as any claim might be made by the husband and wife, and compelled the vendee to accept the title.[6] Mr. Justice Devens, in delivering the opinion of the court in a case in Massachusetts, while admitting that a purchaser would not be compelled to accept a title which is doubtful, or which, even if apparently good, may possibly be defeated by facts and circumstances the existence of which cannot be accurately determined, said: "But a title, however, cannot be considered doubtful when there can be no question of fact involved in a decision as to its validity, but one of law only, upon which the court, where the controversy is litigated, is competent fully to pass. It is unnecessary to consider the question, whether, where only vendor and vendee are before the court, and there are other parties interested in the title, or who may be thus interested, it is the duty of the court to determine, as between them, whether or not the title is good, and enforce or refuse to enforce specific performance accordingly. The later cases in England have indicated a disposition to change what has heretofore been recognized as the rule,—whether wisely or not may be doubted,—and to hold that as even between vendor and purchaser in such case, as a general and almost universal rule, the court is bound to 'ascertain and determine, as best it may, what the law is, and to take that to be the law which it has so ascertained and determined.' It has always been held that where all parties are before the court, so that a decision would have the force and effect of an adjudication in a direct proceeding for the purpose, and thus be an end of controversy on the subject, the validity of a title which depended upon a principle of law was to be finally decided. It was there to be determined to be either good or bad, and

[6] Robinson v. Henning, 9 Ky. Law Rep. 141, 4 S. W. 322.

that the purchaser was bound to take it, or might refuse it. As, by that decision, all parties would be concluded, such a title could not be doubtful." [7] Specific performance will not be refused because an infant is asserting an adverse claim to the property when his right may be finally determined by an appeal to which he is a party.[8] If the answer of the vendee in a suit for specific performance alleges that several portions of the lands are held by others by a paramount title and that the grounds upon which such persons assert title are such as to create in the mind of a reasonable man a just apprehension of losing his land, the vendor, if he does not admit the facts thus alleged, must amend his bill and state specifically all the facts, so far as his knowledge extends, of the claims of these other persons. If he maintains the validity of his own title, he must make such parties defendant, in order to enable a decree to be entered in which the rights of all parties interested may be protected.[9]

[7] Chesman v. Cummings, 142 Mass. 65, 7 N. E. 13. See, also, Butts v. Andrews, 136 Mass. 221; Cornell v. Andrews, 35 N. J. Eq. 7; s. c., 36 N. J. Eq. 321; Gill v. Wells, 59 Md. 492; People v. Stock Exchange, 92 N. Y. 98.

[8] Early v. Douglass, 110 Ky. 813, 62 S. W. 860, 23 Ky. Law Rep. 298. In the English and Federal courts and also in some state courts persons not connected with the contract cannot be made parties: Tasker v. Small, 3 Myl. & C. 63, 14 Eng. Ch. 63, 40 Eng. Reprint, 848; Moulton v. Chafee, 22 Fed. 26; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501; Cella v. Brown, 144 Fed. 742, 75 C. C. A. 603; Springfield State Nat. Bank v. U. S. Ins. Ins. Co., 238 Ill. 148, 87 N. E. 396; Washburn etc. Mfg. Co. v. Chicago Galvanized Wire Fence Co., 109 Ill. 71; Chapman v. West, 17 N. Y. 125; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45. But generally it is proper to join all parties interested in the subject matter: Seagar v. Burns, 4 Minn. 141; Hudson v. Max Meadows Land etc. Co., 97 Va. 341, 33 S. E. 586; McCotter v. Lawrence, 4 Hun, 107, 6 Thomp. & C. 392; Woodward v. Aspinwall, 3 Sandf. 272; International Paper Co. v. Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. S. 736; Baldwin v. Fletcher, 48 Mich. 604, 12 N. W. 873; Moore v. McCullough, 5 Mo. 141; Whann v. Hiller, 110 La. 506; Heavner v. Morgan, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55.

[9] Heavner v. Morgan, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55.

§ 1504. Liens and incumbrances not discharged of record.—Where in an action against the vendor and others as joint defendants, he was not served with summons and therefore no judgment was rendered against him, the fact that his name appears on the record as a judgment defendant does not render his title unmarketable, especially so, as, by the limitation fixed by statute, such a judgment, even if at any time valid, ceased to be a lien.[1] If a contract of sale provides that the purchaser is to take the property subject to a mortgage in process of foreclosure, a notice of the pendency of an action to foreclose will not render the title unmarketable, where it appears that a consent to the discontinuance of the suit in foreclosure had been delivered to the vendor and that an order of discontinuance had been entered in the suit.[2] But a title is *prima facie* unmarketable where it is shown that a notice of *lis pendens* has been filed in an action affecting the land, commenced and still pending and in which the complainant in the action assailed the validity of the title of the vendor.[3]

§ 1505. Unsatisfied mortgages of record.—There is a difference of opinion as to whether a title is marketable where it appears by the record title that a mortgage, in all probability barred by the statute of limitations, has not been discharged. It is the same difference that prevails as to the effect of adverse possession in fulling the requirement to give a good title. For instance, in California, it is held that a purchaser is not compelled to accept a title, incumbered with a mortgage, although probably barred, as it constitutes an incumbrance in the sense that it would require litigation for its removal.[4] If the vendor undertakes to convey a per-

[1] Wessel v. Cramer, 56 App. Div. 30, 67 N. Y. S. 425.

[2] Weissberger v. Wallach, 124 App. Div. 382, 108 N. Y. S. 887.

[3] Moulton v. Kolodzik, 97 Minn. 423, 107 N. W. 154.

[4] Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726. In an exe-

fect title, the purchaser will not be compelled to accept the title as long as there is outstanding an unsatisfied mortgage of record.[5] But in New York it is held that an unsatisfied mortgage on record does not render a title defective if, apparently, it is barred by the statute of limitations.[6] If there is no proof of any facts tending to rebut the legal presumption that an unsatisfied mortgage of record has ceased to be a lien, from lapse of time, the title is not, on that ground, objectionable.[7] The defendants in an action to recover the purchase price alleged fraud on the ground that they were induced to make the purchase on the representation of the vendor that he had a perfect title, causing them to fail to investigate the records, and that a building association had refused to make a loan to them on account of defects in the title, which consisted of unpaid mortgages, the enforcement of which could not be had under the statute of limitations. There was no adverse claim to the property sold nor had the defendants been disturbed in their possession. A demurrer to the counterclaim, thus presented, was sustained.[8]

cutory agreement of sale the vendor impliedly represents that he has a good title as one of the considerations inducing the vendee to purchase: Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726; Wilcox v. Lattin, 93 Cal. 588, 29 Pac. 226.

[5] Hobart v. Frederiksen, 20 S. D. 248, 105 N. W. 168. See as to defects in foreclosure proceedings: Martin v. Hamlin, 176 Mass. 180, 57 N. E. 381; Cook v. Sackett, 96 N. Y. S. 1085, 110 App. Div. 322; Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483; Farrell v. Noel, 45 N. Y. S. 207, 17 Abb. Div. 319.

[6] Katz v. Kaiser, 154 N. Y. 294, 48 N. E. 532, affirming 41 N. Y. S. 776, 10 App. Div. 137, 75 N. Y. St. Rep. 1172. See, also, Pangburn v. Miles, 10 Amb. N. Case. 42.

[7] Paget v. Melcher, 58 N. Y. S. 913, 42 App. Div. 76. See, also, Knapp v. Crane, 43 N. Y. S. 513, 14 App. Div. 120. It is not a valid objection to the title that there are mortgages outstanding, one 75 years old, and another 80 years old in the absence of evidence to overcome the presumption of payment: Forsyth v. Leslie, 77 N. Y. S. 826, 74 App. Div. 517.

[8] Pearson v. Wood, 27 Ind. App. 419, 61 N. E. 593. See, also, Glassman v. Condon, 27 Utah, 463, 76 Pac. 343; Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1118; Krekeler v. Aulbach, 169 N. Y. 372, 62 N. E. 416, affirming 64 N. Y. S. 908,

§ 1506. Mortgage held by state official.—A title is not marketable if it requires litigation to remove a mortgage from record and this is especially true when the fact that the mortgage is held by a state official on behalf of the state prevents affirmative action.[9] The State of South Carolina was the owner of certain property and caused the same to be sold at public auction, the terms of the sale being that the purchaser should pay one third of the price in cash, and execute a mortgage to secure the balance. The mortgage was executed and the mortgagor subsequently tendered to the state treasurer a sufficient amount of what is known as South Carolina revenue bond scrip, but the tender was refused. Under the laws of South Carolina a tender of the full amount due on a mortgage operates as a satisfaction and extinguishment of the lien, regardless of acceptance. The purchaser entered into a contract to sell the land to another, free from any valid lien or incumbrance. The last named vendee refused to receive the deed when tendered and asserted that the scrip tendered was not a valid obligation of the State of South Carolina, and therefore the tender did not operate to extinguish the lien of the mortgage. The vendee was willing to perform his part of the contract if he could receive a good title to the property free from any valid lien. The Supreme Court of South Carolina had decided that the revenue bond scrip were bills of credit the issue of which was forbidden by the Constitution of the United States.[1] Suit was commenced in the circuit court of the United States sitting in Ohio to compel the vendee to pay the amount which he had agreed to pay and to accept the deed tendered to him by the vendor. The

51 App. Div. 591; Solt v. Anderson, 62 Neb. 153, 86 N. W. 1076; Young v. Collier, 31 N. J. Eq. 444; Richards v. Mercer, 1 Leigh (Va.) 125.

[9] Wesley v. Eells, 177 U. S. 370, 44 L. ed. 810, affirming 90 Fed. 151.

[1] State ex rel. Shiver v. Comptroller General, 4 S. C. N. S. 185; Auditor v. Treasurer, 4 S. C. N. S. 311.

Supreme Court of the United States, on appeal, stated that the vendee could not by any affirmative action on his part bring the validity of the tender of the scrip before any court in South Carolina for adjudication. It would be impossible for him to sue the state, and the question could not be effectively reached except in a suit to which the state was a party. If the vendee should accept the vendor's title, he would be unable to have his title established as clear of record unless the state itself should commence an action to foreclose, and consequently the title offered was not marketable and could not become a marketable title except by successful litigation.[2]

[2] Wesley v. Eells, 177 U. S. 370, 44 L. ed. 810. As expressing the views of the court on the question of marketable titles we may quote the following: "Again it is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation. Morgan v. Morgan, 2 Wheat. 290, 299, 301, 4 L. ed. 242, 244, 245; Tiffin v. Shawhan, 43 Ohio St. 178, 183, 1 N. E. 581. And, speaking generally, a title is to be deemed doubtful where a court of co-ordinate jurisdiction has decided adversely to it or to the principles on which it rests. Fry, Spec. Perf. 3d ed. sec. 870, and authorities there cited. One of the grounds upon which a decree for specific performance was denied in Hepburn v. Auld, 5 Cranch, 262, 3 L. ed. 96, 100, was that it would impose upon the defendant the necessity of bringing a suit to perfect his title.

"The principle is well illustrated in Jeffries v. Jeffries, 117 Mass. 184, 187, which was a suit for the specific performance of a written agreement for the purchase of certain real estate. One of the objections to the title was that it was encumbered by conditions that would interfere with the enjoyment of the property. The supreme judicial court of Massachusetts there said: 'Hence the propriety and the necessity of the rule in equity that a defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. Richmond v. Gray, 3 Allen, 25; Sturtevant v. Jaques, 14 Allen, 523; Hayes v. Harmony Grove Cemetery, 108 Mass. 400. He ought not to be subjected, against his agreement or

§ 1507. Mortgage payable in gold coin of present standard of weight and fineness.—If a contract for the sale of land specifies that it is subject to a mortgage in a certain sum, the fact that the mortgage is payable in gold does not render the title defective where it does not appear that

consent, to the necessity of litigation to remove even that which is only a cloud upon his title.' So, in Lowry v. Muldrow, 8 Rich. Eq. 241, 247, the court said that on bills for specific performance of contracts concerning lands, 'courts of equity not to force the purchaser to take anything but a good title, and do not compel them to buy lawsuits.' Numerous other American cases announce the same rule.

"The principle is also illustrated in many English cases. In Parker v. Tootal, 11 H. L. Cas. 143, 158, it was said to be an established rule of equity not to compel a purchaser to take a doubtful title. In Rose v. Calland, 5 Ves. Jr. 186, 188, which was a suit by devisees in trust to obtain the specific performance of an agreement entered into by the defendant for the purchase of an estate, certain reasons were given why the plaintiff could not make a sufficient title, one of which was that the court of exchequer, in Nagle v. Edwards, 3 Anstr. 702, had announced principles which, if followed, would prevent the defendant from obtaining such a title as he ought to have. The lord chancellor said: 'If I was to send this case to the master, I should create a needless expense, for upon the case in the court of exchequer, Nagle v. Edwards, which I have looked into, my difficulty is this: Can I make a person take a title in the face of that decision? If I do, I decree him to enter into a lawsuit. . . . I desire to be understood as not entirely agreeing with the determination of the court of exchequer. But I should be in a strange situation in desiring a purchaser to take this title, because I think the point a pretty good one, though the court of exchequer have determined against it. It is telling him to try my opinion at his expense.' So in Price v. Strange, 6 Madd & G. 159, 165, in which the vice-chancellor said: 'In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision.' In Pyrke v. Waddingham, 10 Hare, 1, 8, it was held that the court will not compel a purchaser to take a title that 'will expose him to litigation or hazard.'

"We are of opinion that the plaintiff's title is not such as a court of equity should compel the defendant to accept. He should not have been compelled to accept it, even if the court below had been of opinion that the revenue bond scrip tendered by Alexander were not bills of credit."

such a stipulation is more onerous than one requiring payment in lawful money.[3] A purchaser of real estate sold at auction, under terms of sale describing it as subject to a mortgage of a specified sum, bearing a specified rate of interest and having a specified period to run, but making no other statement or representation as to the terms or character of the mortgage, is not justified in rejecting the title because the mortgage contains a clause providing that the amount of the mortgage indebtedness shall be paid in gold coin of the present standard of weight and fineness. This does not constitute a variation from the incumbrance described. Mr. Chief Justice Andrews, who delivered the opinion of the majority of the court said: "In this case the land was the subject of sale, and not the mortgage. The purchaser was notified of the existence of the mortgage and its amount. He made no inquiry as to whether it contained any special terms. He purchased subject to this incumbrance, entering into no personal obligation for its payment. The provision in this mortgage, that it should be paid in gold coin, although not present in most mortgages, was not unusual or infrequent. Such a provision is found in many corporate mortgages, and in mortgages taken by savings and other institutions. It was an important provision at a time when treasury notes or legal tenders were not convertible into coin.[3a] Now, under the laws of the United States, the paper currency of the government and silver coins are exchangeable at the treasury for gold coin at their nominal amount; and, as shown in the opinion of Judge Ingraham, the faith of the government of the United States is pledged by solemn and repeated declarations by Congress and the various departments of government to maintain the parity of all the currency issued by the government. The only hazard which the plaintiff would assume in taking the premises subject to the mortgage in question, beyond what would exist if

[3] Hartigan v. Smith, 19 App. Div. 173, 45 N. Y. S. 1012.

[3a] Citing Law of United States, February 25, 1862.

the mortgage was payable without specification of the medium of payment, is the contingency that the United States government would violate its plighted faith, and, within the three years which the mortgage has to run, refuse to redeem its obligations in gold. We think this possibility is quite too remote to justify the assumption that the contract was made in reference to the mortgage being payable generally in lawful currency, and not in a particular kind of lawful money. Special clauses in mortgages are not infrequent. They sometimes contain what is known as the 'insurance clause,' or a clause making the whole mortgage due after a specified default, and other special terms are sometimes inserted. It would not, we conceive, be a valid ground of objection on the part of a purchaser of land subject to a specific mortgage, wherein the contract did not set out such special clauses, that they were not disclosed at the time the contract was made, if there was no deceit or misrepresentation. The contract here is sought to be avoided, not by reason of any fraud or misrepresentation, nor by reason of any variation in the subject of the sale from the description in the contract, but by reason of an incident connected with an incumbrance on the property as to which the contract was silent, which, so far as appears, did not affect the value of the property or influence the purchaser in making his bid, and which we cannot assume, in view of the fact that the government is pledged to maintain the parity and the equal exchangeable value of treasury notes and silver and gold coin, will impose upon the plaintiff, in case the contract is completed, any additional burden. The law will not imply a contract, under such circumstances, that the mortgage was payable generally in any lawful currency, since whether it was or not cannot be supposed to have been a material circumstance entering into the substance of the transaction, or an efficient element in inducing the contract." [4]

[4] Blanck v. Sadlier, 153 N. Y. 551, 40 L.R.A. 666, 47 N. E. 920. A dissenting opinion was filed by Mr. Justice Bartlett, in which he

§ 1508. Assignment of mortgage to mortgagor as trustee.—Ordinarily, if the owner of an equity of redemption takes to himself an assignment of the mortgage and of

said: "Presiding Justice Van Brunt in his dissenting memorandum below said: 'When I contract to pay for property, I may pay in any legal tender; when I take subject to an obligation, I may assume that I can discharge it in any kind of legal tender.' In my judgment, this quotation contains the law of the case clearly and briefly stated. This was a sale at the real estate exchange in the City of New York, under terms of sale which provided: "The property is sold by a good title in fee simple . . . subject to a mortgage of $16,000.00, to be at five per cent, three years to run.' These sales are attended by a large number of bidders, and the purchaser is given ample time to search the title after the property is sold. In this case, by the terms the sale was made June 6th, 1895, and the deed was to be delivered and balance of purchase money paid July 2nd, 1895. The bidders rely upon the terms of sale, and no search of the title is ever made until the property is purchased. If it was the intention to sell this property subject to a mortgage not payable in legal tender, it should have been so stated in the terms of sale. Any other rule will compel bidders to search titles for the terms of encumbrances before they can safely bid at the exchange. The mere statement of this proposition, which will compel hundreds of bidders at the exchange to examine titles they may never purchase, shows how unwise and inconvenient is the rule that is sought to be established in this case. In the legal tender case of Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204, the Supreme Court of the United States laid down the rule (p. 449, 110 U. S. p. 215, 28 L. ed.) that a contract to pay a certain sum of money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. The plaintiff in the case at bar, on consulting the terms of sale, found that the property was "subject to a mortgage of $16,000.00, to be at five per cent, three years to run". He had the right to assume, in the absence of a statement to the contrary, that the mortgage was payable in whatever should be legal tender at the time of payment, whether it might be gold, silver, greenbacks, or treasury notes. If this general right was curtailed by the stipulations of the contract, the terms of sale should have so stated, in order to have put bidders upon their guard. This plaintiff is not seeking to recover damages. He rests upon the presumption that all contracts are payable in legal tender, unless the contrary is made to appear, and, as the terms of sale were silent as to this important point, he disaffirms the contract of sale, and asks to

the debt secured, there will be a merger. But if the assignment is made to himself "trustee, and his heirs and assigns" a presumption is created that he takes the assignment in trust, and the transaction will constitute a cloud upon the title. If after his death his heirs have agreed to convey the land by a good and sufficient deed free from incumbrances, a purchaser will not be compelled to accept a conveyance without a discharge of the mortgage or the production of satisfactory evidence that no trust exists to which the land is subject.[5] A purchaser under a contract binding the vendor to convey "free and clear of all incumbrances," will not be compelled to accept the property subject to a mortgage although the vendee is willing to permit him to retain enough of the purchase money to satisfy the mortgage, if it is impossible to satisfy the mortgage immediately.[5a] And if it is stipulated that the purchase price is to be paid on the delivery of the deed, the existence of a mortgage will justify the purchaser in refusing to accept.[6]

§ 1509. Absence in record of seal from notary's certificate of acknowledgment.—If the certificate of acknowledgment states that the notary affixed his seal, it is not necessary for the recorder, in certifying copies of deeds from his office, to transcribe the notarial seal to the acknowledgment. A certified copy of a deed was offered in evidence, showing a certificate of acknowledgment, stating: "In witness whereof I have hereunto set my hand and affixed my seal, the day and year first hereinabove written," but in the margin in brackets containing the words ["no seal."]. The court held that the deed should have been admitted in evidence, stating: "The certificate asserts that the notary affixed his seal to it,

have restored to him what he paid at the time of the sale. I think he is entitled to recover."

[5] Sturtevant v. Jaques, 96 Mass. (14 Allen) 523.

[5a] Carr v. Dooley, 43 N. Y. S. 399, 19 Misc. Rep. 553.

[6] Swan v. Drury, 39 Mass. (22 Pick.) 485. See, also, Stone v. Fowle, 39 Mass. (22 Pick.) 166.

and the words 'No seal' in brackets in the margin do not imply that there was no seal affixed, but a mere note of the recorder of the place of the notarial seal, which he probably had no means of copying, nor was it necessary that he should transcribe it." [7] If a sale is actually affixed to an instrument, it is not necessary that there should be an expression reciting the existence of a seal.[8] Although the records in the recorder's office may show that in the certificate of acknowledgment in place of the word "Seal" the words "No seal on," yet if the original deed is produced, having affixed to it the seal of the officer who took the acknowledgment, and proof is made that the officer did affix his seal to the certificate at the time of taking the acknowledgment, the deed was then properly admitted to record, and may be admitted in evidence.[9] It is not necessary that the record should contain a copy of the seal nor any *locus sigilli* or scrawl, as the statement in the certificate that the officer who took the acknowledgment affixed his seal will create the presumption that such statement was the fact.[1] A contract of sale provided that "The seller is to furnish within ten days of November 1, 1887, hereof, a complete abstract of title to said property from government, and such certificate as may be required by the buyer as to judgments and mechanics' liens thereon, from various courts in which judgments would be liens thereon," and also, "If upon examination it is found that the seller has a good title in fee to said property, they are to execute and deliver to the buyer a general warranty deed . . . free and clear of all liens and incumbrances whatsoever, except only such as are to be assumed by the buyer hereunder." An abstract was furnished pursuant to the contract, and submitted to counsel who, in their opinion, found among others this objection: "In

[7] Jones v. Martin, 16 Cal. 166. See, also, Emmal v. Webb, 36 Cal. 203; Switzer v. Knapps, 10 Iowa, 72.

[8] Dale v. Wright, 57 Mo. 110.

[9] Equitable Mortgage Co. v. Kempner, (Tex.) 19 S. W. 358.

[1] Geary v. City of Kansas, 61 Mo. 378; Parkinson v. Coplinger, 65 Mo. 290.

the deed from Joseph Joumey to Robert Hudgens, dated, etc., the notary failed to affix his seal to the certificate of acknowledgment." Counsel said that the objection was merely technical and that they would not inisit on it further than to ask a bond of indemnity. On appeal the objection was made but the court, holding that inasmuch as it was the duty of the notary public to affix his seal to his certificate of acknowledgment and the record was silent with nothing to rebut the presumption, and also as the instrument was admitted to record and only those instruments which are proved or acknowledged according to law are entitled to record, the objection was exceedingly technical. To meet the objection an action was brought to divest any title supposed to have been left in the heirs of the deed, and under all these circumstances the court held that the title was marketable.[2]

§ 1510. Certificate of acknowledgment failing to state identity of grantor.—If a deed is not entitled to record and hence cannot be admitted in evidence to prove title, and the original deed is lost, there is a defect in the chain of title. A certificate of acknowledgment stated: "On the tenth day of March, in the year one thousand eight hundred and sixty-nine, before me personally, came John Hanlon to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the foregoing instrument, and acknowledged that he executed the same." It will be observed that the certificate failed to state that the officer knew or had satisfactory evidence that the person making the acknowledgment was the individual described in and who executed the conveyance, as the statute requires.[3] A purchaser refused to accept the deed tendered by the seller for the reason that the title was defective and unmarketable. The seller refused to return the deposit paid,

[2] Mitchener v. Holmes, 117 Mo. 185, 22 S. W. 1070.

[3] Bank Bros. Rev. St. (9th ed.) p. 1836, pt. 2, c. 3, § 9.

and the purchaser brought an action to recover this amount, together with the expenses incurred in searching the title. At the trial the original deed was not produced and the claim was made that it had been lost. The record was, therefore, the only written evidence of the execution and existence of the deed. The court stated that a purchaser is entitled to a title free from reasonable doubt, and that if the defect would interfere with its sale to a reasonable purchaser, he should not be compelled to accept it. "Nor" said the court, "will a purchaser be compelled to take a title which can be cured only by a resort to parol evidence. Applying these principles of law to the conceded facts of this case, I am forced to the conclusion that the title offered plaintiff was of such reasonable doubt as to warrant its rejection upon his part and that a court of equity would so decree. Certainly the Hanlon deed was not entitled to record and consequently cannot be read in evidence. How, then, can the making and delivery thereof be shown in any other way then by parol proof, which may or may not be available to the holder of the title under defendant in any subsequent litigation between him and adverse claimants under Hanlon? Plaintiff should not be obliged to accept title defendable only by parol proof, which the changes and mutations of time may render inavailable." [4] The title to land will not be considered marketable when it can be fairly questioned on account of a defective acknowledgment to a power of attorney.[5] A notary's certificate of acknowledgment, which fails to state that the person executing an instrument was known to him to be the person described in and who executed it, is defective to such a degree as to render a title unmarketable. "Whenever a title" said the court "can be fairly questioned, a contracting purchaser will not be required to take it." [6]

[4] Moran v. Stader, 103 N. Y. Supp. 175, 52 Misc. Rep. 385.

[5] Paolillo v. Faber, 56 App. Div. 241, 67 N. Y. S. 638, 9 N. Y. Ann. Cas. 32.

[6] Paolillo v. Faber, 56 App. Div.

§ 1511. **Misspelling names in certificate of acknowledgment.**—It is provided generally by the statutes of the various states that an officer must not take an acknowledgment unless he knows the person executing the conveyance or has satisfactory proof of his identity. Under such a statute in New York, it was decided that a title is not unmarketable because the names of the grantors in the deed are incorrectly spelled in the certificate of acknowledgment, where the certificate of the notary follows the statute by which he certified that the persons whose acknowledgments were taken were known to him to be the individuals described in and who executed the deed. Such a certificate is sufficient evidence that the deed was executed by the persons who acknowledged its execution.[7]

241, 67 N. Y. S. 638, 9 N. Y. Ann. Cas. 32. See, also, McPhearson v. Schade, 149 N. Y. 16, 43 N. E. 527.

[7] Veit v. Schwob, 127 App. Div. 171, 111 N. Y. S. 286. In this case one of the deeds in the vendor's chain of title was executed by John C. Shütz and Wilhelmina Schütz. The names of the grantors were properly spelled in the deed, and it was not disputed that both signed the deed. In the certificate of acknowledgment it was stated that before the notary "personally came John C. Schultz and Wilhelmina Schultz, his wife, to me known and known to me to be the individuals described in, and who executed the foregoing instrument, and they thereupon severally acknowledged to me that they executed the same." It was contended by the vendee that the mistake of the notary in inserting the letter "l" in the names of the grantors vitiated the acknowledgment and created such a doubt as to render the title unmarketable. The husband was willing to execute another deed, but his wife Wilhelmina, was unable to do so because she was insane. Mr. Justice Miller speaking for the court, which reversed the judgment of the court below said: "I think the names are *idem sonans*. Certainly 'Schütz' and 'Schultz' are as near alike as 'Jetta' and 'Jetter' (Sporza v. German Savings Bank, 19 App. Div. 172, 104 N. Y. Supp. 260), 'Minner' and 'Miner' (Jackson v. Boneham, 15 Johns. 226), 'Paterson' and 'Petterson' (Jackson v. Cady, 9 Cow. 140), or 'Storrs' and 'Stores' (People v. Sutherland, 81 N. Y. 1). A scholar might recognize the umlaut in the German name 'Schütz' but it is doubtful if a man of ordinary education would; and the names 'Schütz' and 'Schultz' by giving the same sound to the vowel, might easily be pronounced so nearly alike that the ear would detect no difference. Doubtless the

§ 1512. Acknowledgment by subscribing witness failing to state residence.—The statute of New York provides that when proof is made by a subscribing witness he shall state his place of residence and that he knew the person described in and who executed the conveyance. It also requires that the officer taking the acknowledgment shall "indorse a certificate thereof, signed by himself, on the conveyance, and in such certificate shall set forth the matters hereinbefore required to be done, known or proved, together with the names of the witnesses examined before such officer, and the places of their residence, and the substance of the evidence given by them." In a suit for specific performance, it was conceded that the title was in a certain person and it was claimed that he had conveyed it by a warranty deed to the vendor's grantor. This deed purported to have been acknowledged and proved by a subscribing witness, but the certificate of acknowledgment to this deed, however, did not state the place of the residence of the subscribing witness, nor did that fact appear from any part of the deed. That the deed was actually made and delivered was satisfactorily proven upon the trial of the case, but such proof was based entirely upon parol evidence, which might or might not be available to the

notary thought that the name was spelled with an "I" from hearing it pronounced.

"But, if there can be any doubt about this the title was still marketable. 'An acknowledgment must not be taken by any officer unless he knows, or has satisfactory evidence, that the person making it is the person described in and who executed such instrument' Real Property Law, Laws 1896, p. 610, c. 547, § 252. In this case the notary has certified that the persons whose acknowledgments he took were known to him to be the individuals described in and who executed the deed. I do not think it is even necessary to resort to parol proof, as the deed and certificate of acknowledgment furnish sufficient internal evidence that the deed was executed by the said John C. Schütz and wife, who concededly were the owners of the property at the time. The title was marketable and the plaintiff should have accepted it: Hellreigel v. Manning, 97 N. Y. 56; Hutton v. Weber, 60 N. Y. Super. Ct. 247, 17 N. Y. Supp. 463, affirmed on opinion below 137 N. Y. 615, 33 N. E. 745.

holders of title in any subsequent litigation. The court held that the change in the statute respecting the residence of subscribing witnesses "as well as its plain object would seem to preclude the court from considering its requirement as either directory or immaterial. It was plainly intended to remedy defects in the pre-existing law, which experience had shown to be dangerous." The court held that to consider this provision of the statute directory or immaterial "violates the language of the statute, deprives it of its efficacy, and puts it in the power of unknown and unascertainable persons the opportunity to foist upon the record evidence of important transactions in real estate without any adequate security against imposition and fraud. It is not necessary that the certificate should be expressed in the language of the statute, or according to any precise form; but in respect to its substantial provisions, it is indispensable that they should in some way be contained in it, and convey to all persons knowledge of the required information." [8] Where a deed is given by a grantor to a grantee to cure a defect it is valid for that purpose and will estop the grantor from setting up the defect.[9]

§ 1513. Acknowledgment before stockholder of corporation.—A title is not unmarketable unless the record shows on its face something which may lead to the ascertainment of a fact that will disturb the title, or unless the title depends on matter outside of the record, which is of itself a doubtful fact, and the determination of which will depend upon judicial proceedings.[1] A vendor agreed "to sell to the vendee certain land without stating anything further as to the title. In a suit for specific performance objection was made to one of the deeds in the chain of title because

[8] Irving v. Campbell, 121 N. Y. 356, 8 L.R.A. 620, 24 N. E. 821.

[9] Fryer v. Rockefeller, 63 N. Y. 269.

[1] Rutherford Land & Improvement Co. v. Sanntrock, 60 N. J. Eq. 471, 46 Atl. 648, 44 Atl. 938.

among other things the acknowledgment of the president of the corporation executing the deed was taken by a notary public, who was both a stockholder and general manager of the corporation. The court said that this objection was not easily to be disposed of and, after referring to cases in which it was held that the separate acknowledgment of a married woman was void when taken by an officer otherwise qualified, who was an agent of the corporation taking the conveyance, said: "But in those cases the privy acknowledgment of the wife was essential to the validity of the deed. Not so with the acknowledgment of the president of a corporation. When the deed of a private corporation is signed, sealed, and delivered, the title passes. The article of the statute above referred to provides, it is true, for the acknowledgment and recording of such a deed, but not as a part of or essential to its execution and validity. There is also a line of cases holding the registration of a deed to be bad where it appears on the face of the record that the officer taking the acknowledgment was connected with the transaction as agent for one of the parties to the deed. In the case at bar it required extraneous proof to show the fact of disqualification. The record of the title, tested by its own recitals, would be clear. Whether or not, however, this would be a sufficient answer to the objection, we need not decide in this case. It will be noted that the contract of sale quoted above is very general in its terms. The obligation which it imposed on appellee was not greater than that implied in all contracts of sale; that is, that the seller is able to make a good, marketable title. This we think appellee established, so far as the deed in question is concerned, when, as before seen, he showed that it had been duly executed. If appellant desired more than this, that desire should have found expression in the contract of sale. Not having there required appellee to furnish him a clear title of record

and in every way satisfactory, he must now be content if a title substantially good is furnished him." [2]

§ 1514. **Outstanding rights.**—A title is not defective because there never has been a legal closing of a highway across it, when it is evident that the road has been abandoned and rights have been acquired which would operate against the public asserting an easement.[3] A title subject to the condition that no mill, factory, brewery, or distillery shall be erected on the land is not marketable.[4] If the eaves of an adjoining house overhang the property to be purchased, the purchaser need not accept a parol promise by the owner of the adjoining house to remove such eaves at any time.[5] Sometimes a doubt may be raised as to the freedom of the property from the claims of creditors of a precedent deceased owner.[6] A title is not free from incumbrances where it is subject to an easement.[7] A title is not marketable where A and B were the owners in common of two adjoining lots, and A conveyed to B his interest in one of the lots, and B conveyed to A his interest in the other. In both deeds there was a reservation of "the privilege of keeping the windows forever open" on the respective sides of the lots conveyed. This is true, even though a building has been erected on one of the adjoining lots having no windows facing the other.[8] "There is no doubt" said Mr. Justice Clarke, "that an easement of light and air, at least to the extent of the windows then existing, was reserved in the mutual conveyances, and that, if existing, said easement would still be beneficial to

[2] Jones v. Hanna, 24 Tex. Civ. App. 550, 60 S. W. 279.

[3] Baldwin v. Trimble, 85 Md. 396, 36 L.R.A. 489, 37 Atl. 176. See § 1518 *post.*

[4] Batley v. Foerderer, 162 Pa. 460, 29 Atl. 868.

[5] Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315.

[6] Chauncey v. Leominister, 172 Mass. 340, 52 N. E. 719.

[7] McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Remsen v. Wingert, 188 N. Y. 632, 81 N. E. 1174, affirming 112 N. Y. App. Div. 234, 98 N. Y. S. 388.

[8] Remsen v. Wingert, 149 N. Y. 16, 43 N. E. 527, *supra.*

the property. When one acquires a title by deed, it will not be affected by nonuser unless there is a loss of title in some of the ways recognized by law. Mere nonuser, however long continued, does not create an abandonment." [9] It is said that "A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land, and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence, his title is not affected by nonuser, and unless there is shown against him some adverse possession, or a loss of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance, when the occasion arises for its use and enjoyment, he will find his rights therein absolute and unimpaired." [1] Nor is a title free from incumbrances which is subject to a judgment.[2] A reservation of a right of way is a substantial defect, sufficient to excuse a vendee from completing the purchase.[3] If apparently all parties in interest have been made parties to a suit in partition, the purchaser has the burden of proof to show the omission of necessary parties rendering the title unmarketable.[4] The failure of the register of deeds to index properly the record of the articles of incorporation of a corporation where the articles had actually been recorded in the proper county, is immaterial.[5]

§ 1515. Outstanding right of dower.—A title is not marketable where a right of dower is outstanding although

[9] Remsen v. Weingert, 112 N. Y. App. Div. 234, 98 N. Y. S. 388.

[1] Welch v. Taylor, 134 N. Y. 460, 18 L.R.A. 535, 31 N. E. 899.

[2] Walsh v. Barton, 24 Ohio St. 28; Brown v. Barngrover, 82 Iowa, 204, 47 N. W. 1082; Newberry v. French, 98 Va. 479, 36 S. E. 519.

[3] Dosch v. Andrus, 126 N. W. 1071.

[4] Day v. Kingsland, 57 N. J. Eq. 134, 41 Atl. 99.

[5] Woodman v. Blue Grass Land Co., 125 Wis. 489, 104 N. W. 320.

it may be inchoate. If a testator devises a life estate in certain real estate to his surviving wife, and also specifically devises the residue, absolutely and in fee she cannot have both the life estate and dower, but must elect which she will have.[6] If, in such case, the power and direction are given to the executors to sell and convey by "a good and sufficient deed" it is implied that the conveyance shall be free of dower. In speaking of the phrase "good and sufficient deed" Vice Chancellor Pitney said that by that language "the testator intended to direct his executors to give good and sufficient title. The will was not prepared by a skilled draftsman, and in common parlance to give a good and sufficient deed means to give a good and sufficient title, and I think that was the force of the language here used. Some of the older English cases, and perhaps a few in this country, have held that a direction to executors to sell and convey real estate did not necessarily indicate that they were to sell free and clear of the dower of the widow. But the modern decisions, which, in my judgment are in more accordance with common sense, tend to hold that a power and direction to sell and convey necessarily includes the idea of conveying the title free and clear of dower. Except sales of real estate by the sheriff on common-law judgments, the cases where a sale of real estate is made by a husband without his wife joining him are very rare indeed. Ordinary purchasers will not accept a title with an outstanding inchoate dower upon it—much less, one that has dower fastened upon it by the death of the husband. Such title is not marketable in the ordinary sense of the word." [7] A court will not decree a specific performance of a contract requiring a good title where there is a dower interest outstanding.[8] In some cases the incumbrance of dower will not defeat a contract to con-

[6] Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198.

[7] Cooper v. Cooper, 56 N. J. Eq. 48, 38 Atl. 198. See, also, Colgate v. Colgate, 23 N. J. Eq. 372; Griggs v. Vehte, 47 N. J. Eq. 179, 19 Atl. 867.

[8] Greffet v. Willman, 114 Mo. 106, 21 S. W. 459.

vey, but an allowance of compensation may be made for the defect.[9] If there is a possible claim of dower the vendor must show that the title is not subject to a reasonable doubt on that ground. Such a doubt, however, arises whenever it is necessary to settle a disputed question of fact and the person under whom the right is claimed is not made a party to the action in which such fact is to be determined.[1]

§ 1516. **Outstanding oil lease.**—An outstanding oil lease will render a title unmarketable.[2] A vendor of oil land failed to state to the vendee at the time when the contract of sale was executed, that an oil lease on the land existed, although such lease was recorded. The vendor, however, before the consummation of the sale informed the vendee of the lease and offered to rescind, but the vendor could not secure a release of the lease and subsequently tendered a warranty deed, subject to the lease, but later, and before the time of consummation of the contract of sale, offered a deed with general warranty. The lease was unilateral and void and a sale by the vendor prior to the commencement of the operations by the lessee would terminate the lease. But in an action brought by the vendors to enforce the contract of sale, the court held that the vendees might defeat the action on the ground that the title was unmarketable, and that the vendee, there being no fraud nor willful refusal to convey, might recover the purchase money paid with interest, but was not entitled to damages. "While the contract in terms" said the court "only bound the vendors to execute and deliver a warranty deed, the law wrote therein that before the vendees could be required to accept it and complete their bargain, or could be made to forfeit anything for failure or refusal so to do, the title ten-

[9] Stimson v. Thorn, 25 Gratt. 278.

[1] Dworsky v. Arndtstein, 51 N. Y. S. 597, 29 App. Div. 274. See, also, Gangloff v. Smaltz, 18 Pa. Super. Ct. 460.

[2] Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105.

dered must not only have been good but marketable. By marketable title is meant one reasonably free from such doubts as would affect the market value of the estate; one which a prudent man with knowledge of all the facts and their legal bearing would be willing to accept. . . . While the lease in this case does not in all respects answer the requirements of the rule as to void incumbrances, which nevertheless render the title unmarketable, yet we think under the peculiar circumstances of this case, and the conduct of the vendees themselves showing they regarded the existence of the least a serious menace to the marketable value of the title, the vendees, in an action by the vendors to enforce the contract of sale, would be allowed to defend on the ground that the lease rendered the title unmarketable." [3]

§ 1517. **Right to prospect for minerals.**—An owner of a good and indefeasible title to land should be able to exercise absolute control of it as against all others, and hence, if the land is encumbered with the right of a railroad company to pass over and across it for the purpose of prospecting it and mining minerals other than coal, the title to the land is not a good and indefeasible fee simple.[4] To the suggestion that the reservation as to "other minerals" ought not to be deemed a defect because it may never appear that there are any minerals under the land, and that in the absence of proof it cannot be assumed that the purchasers are apt to be disturbed in the full and complete enjoyment of the land for every purpose for which it is adapted, the court responded: "On the other hand, it cannot be affirmed, in view of the discovery of valuable minerals in many parts of the West, that there are no

[3] Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105. See, also, Warvelle on Vendors, § 46; Jones v. Phillips, 59 Tex. 609; Hurt v. Reynolds, 20 Tex. 599; Vardeman v. Lawson, 17 Tex. 16; Hollifield v. Landrum, (Tex. Civ. App.) 71 S. W. 979.

[4] Adams v. Henderson, 168 U. S. 573, 42 L. ed. 584, 18 S. Ct. 179; Adams v. Reed, 11 Utah, 480, 40 Pac. 720.

minerals, other than coal under the land in question. What the defendants are entitled to is a marketable title—a good and indefeasible title in fee. But that they will not obtain if forced to take the land subject to the railroad company's right of way over it for the purpose of prospecting for and mining minerals, which may be taken off when found. From that burden they cannot be relieved in any way except by the voluntary action of the railroad company." [5] A person who has conveyed the mineral rights in land is not able to convey a perfect title to it.[6]

§ 1518. **Abandoned public road.**—A purchaser is presumed to have knowledge of a servitude upon land where it is visible and he has bought with this knowledge.[7] But where a railroad company purchased certain lands for railroad purposes to be free from all incumbrances, and running lengthwise within the strip was a public road which for many years had been abandoned, the public using another road laid out nearby, the purchaser not knowing that it was a public road, it was decided that he would not be compelled to accept the title. As the purchaser had "contracted for an absolute estate unfettered by any restriction upon its use and enjoyment," it was entitled to have the land free from incumbrance, and a public road laid out over land, the court held "is an incumbrance that affects its physical condition" and that without knowledge of the existence of this abandoned public road there could be no waiver of the defect in the title.[8] The location of a route for a railroad through land constitutes an incumbrance upon it.[9] So does a grant of a right of way for a

[5] Adams v. Henderson, *supra*.

[6] Eversole v. Eversole, 27 Ky. Law Rep. 385, 85 S. W. 186.

[7] Patterson v. Arthurs, 9 Watts, 152; Mammert v. McKeen, 112 Pa. 315, 4 Atl. 542.

[8] Howell v. Northampton R. Co., 211 Pa. 284, 60 Atl. 793.

[9] Johnston v. Callery, 194 Pa. St. 146, 39 Atl. 73.

railroad company and likewise the reservation of the right of the grantor of the railroad company to enter on the land.[1]

§ 1519. Insanity of vendor's grantor.—If the purchaser possesses knowledge, acquired by investigation of the records, of the insanity of the grantor of his vendor, he has such notice of the probable invalidity of the vendor's title as to justify him in rejecting it as unmarketable. An agreement was made for the sale of real estate by "a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to him the fee simple of the said premises free from all incumbrances and restrictions." The grantor of the vendor had conveyed land to the latter for a consideration of one dollar. One of the heirs of such grantor caused an inquisition in lunacy to be issued and in the proceedings following, the jury found that such grantor was a lunatic, and it appeared by the record that three experts and four other witnesses testified that she was insane. The verdict, however, was not confirmed by the court because it discredited some of the medical evidence although admitting that the evidence was sufficient "to make out a case." An application was made for a new commission, but this was denied on the ground that on account of the grantor's residence the court lacked jurisdiction; and there was a *lis pendens* from the record of the vendor's title. The purchaser was informed by the attorney for the heir at law that there would be further litigation concerning the title. The court held in an action to recover a sum paid on account of the purchase price that the vendor did not have a marketable title free from doubtful questions of law or of act and therefore was entitled to recover the amount paid.[2] Mr. Justice Vann, who delivered the opinion of the court, said that it was not called upon to determine whether the vendor could convey a marketable title

[1] Turner v. Walker, 40 Misc. Rep. 379, 82 N. Y. S. 340.

[2] Brokaw v. Duffy, 165 N. Y. 391, 59 N. E. 196.

to a *bona fide* purchaser who had no notice of the alleged insanity of the grantor, but the question to be determined was whether the vendor could convey a title marketable as to the purchaser while he possessed the knowledge acquired by his investigation. "In determining that question," said the Justice, "the inquiry is not whether the defendant,'s grantor was, or probably was, insane, but whether the plaintiff received such notice of the probable invalidity of the defendant's title as to justify him in rejecting it as unmarketable, because he might be required to defend it upon the ground that her grantor was insane. While it may be that the lunacy proceedings which came to the plaintiff's knowledge and were admitted in evidence upon the trial were insufficient to establish the invalidity of the defendant's title, they were at least sufficient notice to the plaintiff to put a reasonably prudent man upon inquiry as to its validity. They constituted notice that the defendant's title was questioned and in doubt, and that there was existing proof which would justify the conclusion that it was invalid as against him. This notice could not be safely disregarded by a purchaser, as it directly involved the validity of the title. Under these circumstances, the defendant was bound to show by proof which would be satisfactory to a reasonable person that her title was unimpaired by the alleged defects of which the plaintiff had notice, and when she omitted and neglected to make any explanation the plaintiff was not required to accept the proffered title, but might recover the money paid upon the contract." The court stated that the question was not "whether he was actually insane, but whether there was a reasonable doubt about it, which was conclusively established. The evidence as not hearsay, but a fact, as notice, although given orally, is, notwithstanding, a fact. If a grantor in a chain of conveyances regular upon the record should inform a proposed purchaser that a deed purporting to have come from him was a forgery, and that he would take the title at his peril, and should fortify his statement by af-

fidavits, it would be evidence of the same character as that upon which the plaintiff acted." [3]

§ 1520. **Restrictions on use of property.**—A title will not be held to be marketable so as to require a purchaser to accept it where the land to be conveyed is subject to a provision of a land association that houses on the entire tract, of which the land sold is a part, shall be placed a certain distance from the street and that plans of the houses shall be approved by the directors of the association, where the purchaser was ignorant of the restriction.[4] Nor will a contract be enforced where it appears that there is a restriction against the maintenance of a hotel, saloon, blacksmith shop, tannery, or slaughter house, and against the building of a house costing less than a specified sum, where the attention of the purchaser was not called to the restriction before the contract was entered into.[5] "It is a principle" said Judge Miller, "obviously just, in the law relating to the specific performance of contracts, that the vendee is entitled to have that for which he contracts, before he can be compelled to part with the consideration he agreed to pay. He is not bound to take an estate fettered with incumbrances, by which he may be subjected to litigation to procure his title; and, in a contract such as is sought to be enforced in this case, the vendee is not bound to accept anything short of an unincumbered legal estate in fee, the title to which is free from reasonable daubt." [6] A purchaser is not compelled to accept a title encumbered with a servitude or a restriction.[7] Where the con-

[3] Brokaw v. Duffy, 165 N. Y. 361, 59 N. E. 196, Justice O'Brien dissented.

[4] Peabody Heights Co. v. Willson, 82 Md. 186, 36 L.R.A. 393, 32 Atl. 386, 1077.

[5] Shea v. Evans, 109 Md. 229, 72 Atl. 600.

[6] Gill v. Wells, 59 Md. 492.

[7] Halle v. Newbold, 69 Md. 265, 14 Atl. 262; Newbold v. Peabody Heights Co., 70 Md. 493, 3 L.R.A. 579, 17 Atl. 372; Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303; Post v. Weil, 8 Hun (N. Y.) 418; Batley v. Foerderer, 162 Pa. St. 460, 29

tract provides that the purchaser is to receive a perfect title, a recorded agreement which imposes building restrictions upon the land constitutes an incumbrance upon the title. This is true, even if the covenant is a personal one, but assuming to bind all representatives as it might be enforced by a court of equity against purchasers with notice.[8] The title may not be good although the covenants do not run with the land, as their precise form or nature is immaterial. "It is not essential that it should run with the land. A personal covenant, or agreement, will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." [9] Land is not free from incumbrance where it is subject to a restriction as to the purpose

Atl. 868; Goodrich v. Pratt, 114 N. Y. App. Div. 771, 100 N. Y. 187; Altman v. McMillan, 115 N. Y. App. Div. 234, 100 N. Y. S. 970.

[8] Whelan v. Rossiter, 1 Cal. App. 701, 82 Pac. 1082. In this case the owners in fee as tenants in common of certain blocks entered into a written agreement for the purpose of directly benefiting all the property and enhancing its value by which they agreed: (1) that no buildings were to be erected upon any part of said lands except for private residences; (2) that no building, or any part thereof erected upon any part of said premises should be used or occupied as a blacksmith shop, or as a grocery store, or saloon, or place of public amusement; (3) that no buildings or superstructure erected upon any part of said lands, except fences should be built within twenty feet of the street; (4) that no alley way or private street should be opened through any portion of said lands.

[9] Whitney v. Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715. "It is entirely competent" said the court in New York "for adjoining owners of land by grant to impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings. The covenants being mutual and imposing such restrictions in perpetuity are in effect recipcocal easements, the right to the enjoyment of which passes as appurtenant to the premises. Observance of such covenants will be enforced by a court of equity": Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 203.

for which it may be used.[1] The purchaser will not be compelled to accept a conveyance when the contract calls for a fee simple title and the land is subject to a restriction which prevents building out to the street line.[2]

§ 1521. **Common scheme of building must have been preserved.**—A general building plan may be disregarded so as to make a restriction valueless. Thus, in a deed made by the grantor of the vendor there was a restriction "that dwellings are the only buildings to be erected on the front portion of said lots . . . and shall be kept back ten feet from the street line." The vendor had erected buildings six feet from the street line, and in a suit for specific performance of a contract to purchase, the purchaser contended that on account of this breach of the restriction it would be hazardous for him to accept a conveyance. This restriction was inserted in several conveyances made by the vendor's grantor, but in every instance it had been violated and therefore if such grantor had a general building scheme it had been disregarded. The question was whether the vendor could give a marketable title, which would not expose the purchaser to the hazards of litigation in regard to it. The court said that the doubt as to the sufficiency of the title must be "a rational doubt," [3] or "real and not fanciful," [4] and that there must be "some debatable grounds on which the objection to the title can be justified." [5] The court declared that there was present no doubtful question of law or fact, and that the only conceivable litigation would be either an action at law for damages or a bill for a mandatory injunction; and that as to the action at law, it could only be brought against the vendor,

[1] Van Schaick v. Lese, 66 N. Y. Supp. 64, 31 Misc. Rep. 610.

[2] Roussel v. Lux, 80 N. Y. Supp. 341, 39 Misc. Rep. 508.

[3] Citing Barger v. Gery, 64 N. J. Eq. 263, 53 Atl. 483.

[4] Citing Methodist Epis. Church v. Robertson, 68 N. J. Eq. 433, 58 Atl. 1056.

[5] Citing Vreeland v. Blauvelt, 23 N. J. Eq. 483.

who had broken the covenant, and that as to bill for an injunction, the application should have been promptly made and the common scheme of building must have been actually preserved. The court held that the possibility of injury was so remote that no just ground existed for refusing to perform the agreement.[6]

§ 1522. **Encroachment on adjacent lot.**—A title is not marketable under a contract providing for a fee simple title where more than an insignificant portion of a building encroaches upon an adjoining lot. Thus where the building upon the property to be conveyed encroaches one inch on adjacent lots to which the vendor has no title, the title is not marketable. The vendee, under such a contract is entitled to a clear title to the building and lot on which it is placed. If adverse possession was claimed by the vendor he had the burden of showing that such possession had ripened into title.[7] The contract in the case cited in the note below bound the vendor to convey certain premises known as Nos. 64, 68, and 70 Seventh Avenue "for the conveying and assuring to each to the other, the fee simple of the property of each above described, free from all encumbrances, if any name or nature whatever," except as specified. The court said: "The plaintiff undertook to give to the defendant a good title to the premises. He was to convey not a specific lot of ground but certain specific premises consisting of these three four-story flats. The deed which he tendered failed to convey these buildings and the land upon which they were erected. Thus, strictly speaking, the plaintiff never did actually tender to the defendant a deed of the property that he contracted to convey, as to a part of the land upon which the building,

[6] Zelman v. Kaufherr, 73 Atl. 1048.

[7] Stevenson v. Fox, 40 App. Div. (N. Y.) 354, 57 N. Y. Supp. 1094.

were erected the plaintiff did not have, and did not claim to have, the title. A distinction is, therefore, presented between this case and cases in which a certain lot of land was contracted to be conveyed, where it appeared that the vendor had good title to the lot of land which he contracted to convey and his conveyance would assure to the vendee a good and indefeasible title to such lot of land; the only objection to the conveyance being the fact that an insignificant portion of the wall of the building upon the land contracted to be conveyed was upon adjoining premises. Here the title of the plaintiff to a portion of the property which he undertook to convey to the defendant failed." [8] Where a building encroached two inches at one point on an adjoining lot and where, notwithstanding the lapse of twenty-five years, the vendor admitted that by reason of the fact that the adjoining lot had for a part of the time been owned by minors he could not perfect his title by adverse possession, the court held that the title was not marketable, and that on that ground a purchaser was justified in refusing to accept a deed under a contract to convey with warranty.[9] Presiding Justice Van Brunt in delivering the opinion of the majority of the court said that "questions of the nature of the adverse possession and the sufficiency of its duration are always questions which are open for investigation and consideration; and the purchaser will not be compelled to take title where there are circumstances which may have prevented the possession from ripening into a title. . . . In the case at bar, in order that this adverse possession should have ripened into a title, it was necessary to show that such possession was intended to be adverse, and further, that the parties in whom the title to the premises claimed to be held adversely was vested were in such a condition that the statute of limitations ran, and the protection of the statute inured to the benefit of the ad-

[8] Stevenson v. Fox, 40 App. Div. (N. Y.) 354, 57 N. Y. Supp. 1094.

[9] Wilhelm v. Federgreen, 2 App. Div. (N. Y.) 483, 38 N. Y. Supp. 8, affirmed 157 N. Y. 713, 53 N. E. 1133.

verse possessor. In the case at bar there certainly was no proof that the possession in question had ripened into a title, or that the statute had run by showing that there were persons in being who could have asserted their rights, and who were bound so to do within the period of the occupation. On the contrary, it appeared affirmatively by the statement of the defendant that the reason that he could not perfect his paper title was that the property had been willed to infants. It was clear, therefore, that the possession in question had not ripened into a title. Parties are not required to complete a purchase where it appears that there is a reasonable objection to the title, and no clear and satisfactory proof that such objection is without foundation." [1]

§ 1523. **Building should be on lot.**—Where a contract provided that the vendor should convey "the houses and lot being and known as 'No 530 East Twelfth street' in the city of New York, the size of lot being 25 feet in width front and rear by 100 feet in depth," the vendee will not be compelled to accept if the house has but three walls, the beams being inserted in the remaining side in a wall on the lot of an adjoining owner, notwithstanding the fact that the vendor possesses a prescriptive right to the use of the wall for that purpose. The court held that the only evidence of adverse

[1] Wilhelm v. Federgreen, *supra*. A dissenting opinion was filed by Mr. Justice Bartlett in which Mr. Justice O'Brien concurred, to the effect that the case was one of the practical location of and long acquiescence in a boundary line and that to condemn a title upon the fact appearing in this case "would be a serious inroad upon the rule of repose, and would limit the practical location doctrine to the strict conditions attaching to adverse possession," and observed, that "The former doctrine is quite as important to the quieting of city titles as it is with regard to farm lands. It has been applied in the country where the practical location has been fixed by a hedge fence or a row of trees. It may well be applied with equal liberality where the boundary was originally fixed by the solid wall of a four story house."

possession was that the property had remained in the condition described for upwards of twenty years, but it did not appear that the owners of the adjoining property were in such a condition that the statute could have run against them during the statutory period. In a concurring opinion Presiding Justice Van Brunt said: "When a party buys a lot with a building thereon, he is entitled to have the whole of the building upon the lot, and not a material portion of it situated upon an adjoining lot, even though the right to keep it there may exist." [2] At an auction sale, the property sold was described in handbills distributed as "No. 19 Fourth street, a substantial three-story frame house, with basement and sub-cellar filled in with brick to the roof. . . . House twenty-two feet four inches by thirty feet; lot twenty-two feet four inches by seventy-five feet. The property is finely located, . . . is surrounded by stores, and is rapidly increasing in value." The purchaser claimed to rescind the sale, and in an action brought to recover the deposit made by him, evidence was introduced tending to show that the vendor was not the owner of the whole lot purported to be sold, but that the house was to the extent of an inch and a half on lands to which the vendor had no title and that the title of the vendor extended to seventy-three feet of the lot in depth. In the charge to the jury, the trial court instructed them: "If you find this house did stand upon the lot of somebody else to the extent of one and one half inches it was a reasonable ground of objection," and on appeal it was held that there was no error in the instruction.[3] The court said "that the true rule in determining whether the question of materiality is one of law or of fact is, that where it depends upon and

[2] Spero v. Schultz, 14 App. Div. 428, 43 N. Y. Supp. 1020. A dissenting opinion was filed by Mr. Justice Ingraham to the effect that a party wall agreement would be implied, and also that there would arise an implication of a contract or grant by which the wall would become a party wall.

[3] Stokes v. Johnson, 57 N. Y. 673.

is an inference to be drawn from circumstances—that is, if under one set of circumstances it would be material, under another not—it is a question of fact; but where it turns upon the construction of a writing, and no special circumstances would be taken into account, as in this case, it is a question of law; that from the description of the building, as given in the handbill, the defect, if it existed, was necessarily material, and such as seriously to diminish the value of the property; that the test of materiality is, had the falsity of the representation been known, the contract would not have been entered into."[4] A title is not marketable where the vendor agreed to sell a lot on which a building was in process of erection, one wall of which encroached about two inches on the adjacent premises, nor is the fact material that there may be no injury to the adjoining premises.[5] An encroachment on an adjoining lot will not be material, if such adjoining owner has made a deed of the right to such use as long as the building shall stand.[6] The fact that the building on the lot to be conveyed encroaches on the adjoining lot is not material, if it is dilapidated and practically worthless, and incapable of occupation, without the removal and reconstruction of its walls.[7]

§ 1524. **Encroachment and independent wall.**—An encroachment may be so slight that a court will disregard it. Where the wall of a vendor extends on the property of an adjoining property owner about three quarters of an inch,

[4] Stokes v. Johnson, 57 N. Y. 673.

[5] Snow v. Monk, 81 App. Div. 206, 80 N. Y. Supp. 719. See, also, Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 22 N. E. 233, 12 Am. St. Rep. 844; Irving v. Campbell, 121 N. Y. 353, 24 N. E. 821.

[6] Volz v. Steiner, 73 N. Y. Supp. 1006, 67 App. Div. 504. An encroachment of three inches is sufficient to justify a purchaser in refusing to complete the purchase: Bergman v. Klein 89 N. Y. S. 624, 97 App. Div. 15.

[7] Weil v. Radley, 163 N. Y. 582, 57 N. E. 1128, affirming 52 N. Y. Supp. 398, 31 App. Div. 25.

and the owner of the adjoining property has built an independent wall on his property, the encroachment is so slight that the court may disregard it, "for the real question is as to the likelihood of there being any molestation of the owner of the house in the enjoyment of the wall while the building remains standing. It is not too much to say that no court would compel the owner of this wall to take it down, or, as the proofs in this case are made, allow to the owner of the adjoining land any damages for an encroachment." [8] An encroachment of half an inch on an adjoining lot is too small to justify a purchaser in declining to comply with his contract.[9]

§ 1525. Piers of building upon city street.—While a purchaser will not be forced to accept a title, as marketable, which he may be obliged to defend by litigation, yet the defect in the title may be a mere possibility. In such a case the court may exercise its discretion as to compelling the vendee to accept the title. Thus, the property contracted to be sold consisted of a corner lot in a city in which a building had been erected and was standing. The lower portion of this building was of stone, and the outer surface of the stone work projected two inches over the street line and within that part of the sidewalk which in a proper case and by the exercise of proper authority might be withdrawn from the use of the general public, but no easements of light, air, or access posesssed by adjoining owner was affected by the encroachment. The building had been standing in this con-

[8] Macdonald v. Bach, 64 N. Y. Supp. 831, 51 App. Div. 549. The court said that the evidence relating to the encroachment was given by surveyors, whose testimony was so unsatisfactory "that the trial judge might well have considered that there was no encroachment at all."

[9] Keitel v. Zimmerman, 43 N. Y. Supp. 676, 19 Misc. Rep. 581. See as to an encroachment of a quarter of an inch: Katz v. Kaiser, 154 N. Y. 294, 48 N. E. 532, affirming 41 N. Y. Supp. 776, 10 App. Div. 137, 75 N. Y. St. Rep. 1172.

dition for about five years without objection from the city, when the owner sold the property agreeing to give a marketable title. In determining the question of the marketability of the title, the court held that, in the absence of evidence it might be assumed that the owner had observed the preliminary requirements of filing with the proper authorities the necessary plans, and that the building had been erected with the consent of the city after the approval of these plans, as any contrary assumption would be based upon the conclusion that the officials of the city had failed to perform their duties. No complaint had been made by the city and no steps had been taken for the purpose of removing the encroachment. "Under these circumstances," said the court, "is not the possibility of hostile action by the city so remote that it should not be regarded as affecting the marketability of the title? Would this not be a case where the principle *'de minimus non curat lex'* would apply? It is undoubtedly the rule of law that a purchaser will not be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be free from any reasonable doubt that would interfere with its market value." The court concluded that the contingency of an attack upon the title was so remote that "a reasonably prudent man would not refuse to accept it."[1] In a case where a motion was made by the purchaser at a partition sale to relieve him from his purchase, the court said: "A purchaser will not be compelled to take title where a doubtful question of fact relating to an outstanding right is not concluded by a judgment, under which the sale was made. But this rule will not operate in every case to bar the enforcement of the sale. If the existence of the alleged fact which is claimed or supposed to constitute a

[1] Empire Realty Co. v. Sayre, 107 App. Div. N. Y. 415, 95 N. Y. Supp. 371.

defect in or cloud upon the title is a mere possibility or the alleged outstanding right is but a very improbable or remote contingency, which, according to ordinary experience, has no probable basis, the court may in the exercise of a sound descretion, compel the purchaser to complete his purchase." [2]

§1526. **Party Wall.**—If an agreement is made by adjoining land owners, for the limitation to which foundations should be sunk on the dividing line and for the protection of the wall of each owner in case the other should erect a building on a foundation any deeper than the foundation of the building of the first, the agreement will constitute a cloud on the title to such an extent as to relieve a purchaser from complying with a contract to purchase an unincumbered title.[3] But a purchaser is not justified in refusing to comply with his contract for the reason that a party wall agreement is outstanding, which, however, was to remain in force only for the time that the parties executing it or their legal representatives continued to have title and the interest of all such parties in the land has terminated.[4] It is good ground of objection to the enforcement of a contract to purchase a lot with a building on it that the building has but three walls, the fourth side depending on beams inserted in the wall of the building on the adjoining lot where the owner does not show the right to support on that wall.[5] A servitude may be created upon the adjoining lot. Thus, where a person after a personal examination contracted to purchase a lot, described by metes and bounds, with the house thereon, and where the party wall was wholly on the adjoining lot for a part of its length, to be maintained not under a perpetual covenant, but only so long as the wall and building should endure, it was

[2] Cambrelling v. Purton, 125 N. Y. 616.

[3] Leinhardt v. Kalchheim, 79 N. Y. Supp. 500, 39 Misc. Rep. 308.

[4] Kahn v. Mount, 61 N. Y. Supp. 358, 46 App. Div. 84.

[5] Neher v. Bruckner, 165 N. Y. 617, 59 N. E. 1127.

held that, inasmuch as the same person had originally owned both lots, and had erected houses on them, a servitude upon the adjoining lot had been created by which the right to rest the beams of the house on such walls during the existence was given. A contract for the conveyance of the fee free and clear of all incumbrances, was, under these circumstances, fulfilled by the execution and delivery of a warranty deed.[6] If before the execution of the deed the purchaser under a contract for the purchase of a city lot with improvements learns that there is a party-wall agreement, he is not justified in refusing a deed or recovering back the amount paid by him, as such an agreement does not constitute a defect in the title.[7] But an incumbrance is created by the existence of a party wall on the lot, with a covenant running with the land which provides for the rebuilding of the wall at the joint expense of the lot owners. A purchaser under a contract for the conveyance of the lot free from incumbrances will not be obliged to accept.[8]

§ 1527. Title to be passed upon by purchaser's attorney.—Frequently contracts for sale provide that the title shall be passed upon by the attorney for the vendee. But, in such a case, his decision that the title is not good will not destroy the vendor's right to compel the purchaser to accept it. The attorney cannot act unreasonably in the matter, and if he unreasonably refuses to hold the title to be good, his act will not defeat a recovery upon the contract. If, as a matter of fact, the title is indisputably good, the failure or refusal of the attorney so to decide is in such a case unreasonable.[9] "If the existence of the alleged fact which is

[6] Schaefer v. Blumenthal, 169 N. Y. 221, 62 N. E. 175, reversing 64 N. Y. Supp. 687, 51 App. Div. 517, 8 N. Y. Ann. Cas. 1.

[7] Levy v. Hill, 174 N. Y. 536, 66 N. E. 1112, affirming 75 N. Y. Supp. 19, 70 App. Div. 95.

[8] Oppenheimer v. Knepper Realty Co., 98 N. Y. Supp. 204, 50 Misc. Rep. 546.

[9] Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195, 17 Am. St. Rep. 634; Doll v. Noble, 116 N. Y. 230, 5 L.R.A. 554; Du-

supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency, which, according to ordinary experience has no probable basis, the court may compel the purchaser in such case to complete his purchase." [1] But a purchaser should have a title of such a character that, if he desires to sell, he may have a reasonable assurance that there will be no flaw or doubt to affect the market value of his property.[2] Where the contract provided that the title should be "first class" and should be passed upon by a lawyer or conveyancer to be designated by the purchaser, Mr. Justice Brown, speaking for the court, said: "The provision that the title was to be passed upon by the defendant's lawyer or conveyancer did not make the decision of the conveyancer that the title was good a condition precedent to the right of the plaintiff to enforce the performance of the contract. If a decision to that effect was refused unreasonably, the failure to obtain it would not defeat a recovery, and it would have been unreasonably refused if in fact, beyond all dispute, the title was good." [3] The mere opinion of counsel that the title is defective is not competent proof of such fact.[4] In an action by a broker to recover his commission where the purchaser declined to take the property on account of an alleged infirmity in the title, and the evidence relied on was that of the attorney for the proposed purchaser, who testified that it was not good, the court said:

plex Safety Boiler Co. v. Garden, 101 N. Y. 388; Bowery Nat. Bank v. New York, 63 N. Y. 336; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Thomas v. Fleury, 26 N. Y. 26; Folliard v. Wallace, 2 Johns 395.

[1] Ferry v. Sampson, 112 N. Y. 415.

[2] Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654; Ferry v. Sampson, 112 N. Y. 415; Fleming v. Burnham, 100 N. Y. 1; Shriver v. Shriven, 86 N. Y. 575; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234; Dobbs v. Norcross, 24 N. J. Eq. 327.

[3] Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 24 N. E. 195, 17 Am. St. Rep. 634.

[4] Brackenridge v. Claridge, 91 Tex. 527, 43 L.R.A. 593, 44 S. W. 819.

"His conclusion necessarily involved his opinion as to the law of the title. The opinion of counsel, however learned and able, is not evidence. The court must determine the law for itself." [5] A purchaser is not justified in refusing to accept a title when the objection of the examiner is founded on a mistake of fact.[6] A vendor is not prevented from enforcing the specific performance of a contract made by a city, requiring the approval of the title by the corporation counsel, by the fact that such officer refused to approve the title, if the title is marketable.[7] The purchaser must take the risk that the advice given to him is sound, and he is not justified in refusing to accept a deed and demanding a return of a deposit paid by him on account of the purchase price simply because his attorney has given an opinion in good faith that the title is not safe, if, in fact the opinion is not correct, and as a matter of fact, the record title is perfect.[8] "A purchaser of real property," says Mr. Chief Justice Beatty, "does well to obtain professional advice as to the validity of the title, but he must take the risk of the soundness of the advice upon which he acts. It may turn out to be erroneous, and if so, the fact that it was given and acted upon in good faith will not exempt him from damages for the breach of his contract." [9]

§ 1528. **Adverse advice of counsel a material fact.**—While the opinion of counsel standing alone is not sufficient to justify a purchaser in rejecting a title as unmarketable when it in fact is valid, still there are cases which, while recognizing this principle, maintain that the adverse opinion of counsel is a material fact and its value in a particular case

[5] Brackenridge v. Claridge, *supra.*

[6] Hoffman v. Colgan, 25 Ky. Law Rep. 98, 74 S. W. 724.

[7] Lighton v. City of Syracuse, 96 N. Y. Supp. 692, 48 Misc. Rep. 134.

[8] Montgomery v. Pacific C. L. Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 640.

[9] Montgomery v. Pacific C. L. Bureau, *supra.*

will depend upon the counsel and the circumstances under which he is acting. Thus, where the counsel for the purchaser, acting in good faith and guided by ample professional knowledge, and actuated by a desire to have the transaction consummated, refused to accept the title on behalf of his client, and two arbitrators selected by the vendor and vendee for their judicial standing, knowledge and experience, failed to agree upon the questions of law involved, the court said: "It cannot fairly be said that a title which is thus viewed by able lawyers, who have no conceivable motive for reaching a biased opinion, is marketable. No reasonably prudent man would accept such a title in the ordinary course of business, especially in a transaction of the magnitude and importance of this in which the vendee is required to pay three quarters of a million dollars for the property. The opinion of counsel that a title is bad or unmerchantable may or may not in itself be sufficient to create a doubt which would justify the vendee in refusing to accept it."[1] If the counsel of a loan company will not certify to the title to a tract of land, by reason of which the company declines to take a mortgage on the property, the title is not marketable.[2] In the case just cited the court adopts the language of Lord Eldon, who said: "If there is a considerable—a rational—doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title."[3] A purchaser is justified in refusing to consummate the purchase if the rejection of the title is based upon the good-faith opinion of counsel and if any of the questions involved are doubtful questions of law.[4]

§ 1529. **Purchaser not concluded by advice of his attorney.**—On the other hand a purchaser is not concluded

[1] Howe v. Coates, 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 107 N. W. 397, 114 Am. St. Rep. 723.

[2] Miller v. Bronson, 26 R. I. 62, 58 Atl. 257.

[3] In Stapylton v. Scott, 16 Ves. 272; Miller v. Bronson, *supra*.

[4] Walker v. Gilman, 127 Mich. 269, 86 N. W. 830.

by the advice of his attorney, who expressed himself as satisfied with the title, where he was not authorized to waive objections. The purchaser has the right to seek the advice of other attorneys, and the question to be determined is not what the opinion of an attorney is, but whether, within the meaning of the law, the title is marketable.[5] It was said by Presiding Justice Cooper: "It would be a strange doctrine which would compel the plaintiff to take a defective title, in the face of the agreement to give him a good one, simply because the attorney whom he employed gave an erroneous opinion as to the title. Plaintiff was not bound by the opinion, and surely the vendor was in no position to profit by it. On the contrary, the plaintiff had the right to employ as many attorneys as he saw fit, and to have the advice of each and every one of them, and the question would still be as to whether or not the title tendered was a marketable title within the meaning of the law." [6]

§ 1530. Title to be accepted or rejected by the attorney.—But a contract of sale may be so drawn that the question is immaterial as to whether or not the title to the property to be sold is in fact marketable. The material question under the contract may not be whether the title is good and marketable, but whether it is accepted to the attorney for the purchaser. If a contract provides that the title is "to be examined or rejected" by the purchaser's attorney and the attorney rejects the title, the purchaser can recover his deposit where there is no proof that the rejection of the title was not the consequence of a careful examination and honest opinion on the part of the attorney.[7] Where there is no bad faith or un-

[5] Walters v. Mitchell, 6 Cal. 410, 92 Pac. 315.

[6] Walters v. Mitchell, *supra*.

[7] Allen v. Pockwitz, 103 Cal. 85. In this case the instrument construed by the court was as follows:

"San Francisco, June 21st, 1889.

"Received from John De Witt Allen the sum of one thousand ($1,000) dollars, being deposit on account of thirty-five thousand ($35,000) dollars, U. S. gold coin,

reasonableness on the part of the purchaser or his attorney, a disapproval of the title by the attorney will prevent a specific performance of a contract, providing that the purchase of the property is subject to his approval or acceptance,[8] and a stipulation that the title shall be approved by an attorney mentioned is binding on the vendor.[9] Where a contract provides that no part of the purchase price, shall be paid except a sum already paid, "until an unqualified opinion of" a firm of attorneys "shall be furnished to the said party of the second part, or his successors or assigne, based upon an examination of the records of Ventura County, that the record title to said land is vested in the estate of William Sexton, deceased, or in the said party of the first part as executor, trustee, or individually, free from all incumbrances, but when said opinion shall have been furnished them, the said payment shall be due and payable as before provided," if the opinion delivered is not such as called for by such agreement, the purchaser cannot be required to make any further payment.[1]

the purchase price of the property this day sold to him, situated in the City and County of San Francisco, State of California, and described as follows, to-wit:—

"Lot and improvements situated at the northeast corner of Van Ness and Ash avenues, 58 feet on Van Ness avenue, by 100 feet on Ash Avenue.

"Terms of sale: 21 days are allowed to examine title and consummate sale. At the termination of said time the balance of said purchase money is due and payable upon tender of the deed of the property sold.

"Title to be examined and accepted or rejected by J. De Witt Allen's attorney. Abstract to be run down to date; $150.00 to be allowed for attorney's fees. Mortgage to be released and to be free and clear from all encumbrances. Taxes to be paid to July 1st, 1889.

"If the sale is not consummated in accordance with the foregoing conditions the deposit to be forfeited.

"David Stern and Son, Agents.

"Agreed to: John De W. Allen."

[8] Greer v. International Stock Yards Co., 43 Tex. Civ. App. 370, 96 S. W. 79.

[9] Thompson v. Dickerson, 68 Mo. App. 535.

[1] Leach v. Rowley, 138 Cal. 709, 72 Pac. 403.

CHAPTER XLII.

ABSTRACTS OF TITLE.

§ 1531. Definition of abstract.
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1563. Knowledge of legal effect of conveyances.
1564. Liability to employer only.
1565. Searcher knowing abstract is to be used by purchaser.
1566. Custom for subsequent purchasers to rely upon abstract.
1567. Owner of property acting as agent for lender.
1568. Actual damages sustained.
1569. Apprehension of damage.

§ 1531. **Definition of abstract.**—An abstract of title may be defined as "a summary or an epitome of the facts relied on as evidence of title. Such being its meaning, it might consist of a note of a single conveyance, as it always does where the patentee furnishes an abstract of his title. But an abstract, properly so called, must contain a note of all conveyances, transfers, or other facts relied on as evidence of the claimant's title, together with all such facts appearing of record as may impair it." [1] Mr. Warvelle defines an abstract as "a condensed history of the title to land consisting of a synopsis or summary of the material or operative portion of all the various instruments of conveyance which in any manner affect said land, or the title thereto, or any estate or interest therein, together with a statement of all liens, charges or liabilities to which the same may be subject, and of which it is in any way material for purchasers to be apprised. It is usually arranged in chronological order and is intended to show the origin, course and incidents of the title without the necessity of referring to the original sources of information." [2]

[1] Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

[2] Warvelle, Abstracts, § 2. The same author speaking of the origin of abstracts and of the methods followed in England and the United States, says: "Although the use of abstracts of title has now become universal, where free alienation of land is permitted and property rights are recognized, but little can be said as to the origin of the practice. The earliest English works on the subject, published during the first half of the last century, treat of the abstract as an established fact, but make no mention of the period at which it first began to be used.

During the earlier years of the United States, but little attention was paid to title in purchases of real property. Ordinarily the buyer was fully satisfied with the vendor's "warranty" deed, the covenants thereof being taken as conclusive evidence of all they recited. No inquiry was made with respect to the past, present possession being considered a sufficient guarantee of ownership, and no thought was taken as to the future. Transfers of land were frequently accompanied by the vendor's purchase deeds and other muniments upon which the title was based, and such may still be the custom in some parts of the country. But, with the flood of years, the increasing commercial activity of the age, the

§ 1532. Agreement to furnish abstract.— If a vendor in a contract of sale agrees to give an abstract of title to the purchaser and the condition of the sale is that the title

removal of property disqualifications and other impediments to alienation, has come to a vast accumulation of evidences of title, frequently involving complex interests that call for a high degree of skill to arrange and classify, as well as to interpret and adjust. Land, too, in many localities has acquired an almost fabulous value and purchaser's now part warily with their money and only on strong assurance of title. It is no longer practical, save in rare instances, to examine title by specific inspection of the original documents, were such always available, or to laboriously follow on the records the various mutations through which it has passed. Yet, as purchasers take at their peril, save as they may find protection in the covenants of their deeds, it is necessary that they should be apprised of whatever may affect the validity of the title or estate they take, of which the law charges them with actual or constructive notice. To satisfy this demand has been developed the modern abstract of title, together with its incident, the examiner.

"Without going into detail at this time it may be stated generally, that the abstract should furnish all the material information contained in the original documents and records from which it is complied, and that, as fully and completely as if they had been specifically inspected. It should show, when from the source of title, the inceptive measures; the foundation of title; the devolution of same to date of examination, including all transfers of any and every interest; the incidents of the land itself, divisions and subdivisions; any and all adverse titles or claims; all liens or charges, however created, including judgments against the person during the period the law makes them a lien on land; taxes, special assessments, and statutory liens; and every other matter or thing appearing of record that may affect, implicate or impair the title. To these, in proper cases, may be added any matter *in pais*, that to the examiner may seem pertinent or material. . . .

Aside from an arrangement of indexes and references, there is no system of title abstracts that can be said to be distinctively American, the methods varying somewhat in different sections, though preserving a general similitude. The spirit and operation of our laws preclude the adoption of the English methods to any appreciable extent, although it would seem that the abstract makers of the Eastern States still follow as closely as possible in the footsteps of their English predecessors, and their work is usually constructed upon the regulation English model. In the Middle and Western States, the operation of the United States land laws, the later methods of survey and subdivision, and the al-

shall be good or there shall be no sale, and in such event the purchase money is to be refunded, the fair interpretation of the contract is that a full abstract of the title is to be furnished. If a good record title does not appear from the abstract, the purchaser is not required to make an investigation outside of it, nor is he required to run the risk of any litigation shown by the abstract to be either pending or probable. Evidence outside of the terms of the contract cannot be received in an action for the recovery of the purchase money to show the invalidity of the claims of those who appeared by the abstract to be settling up an adverse title to the land, and who were prosecuting suits based on their claims.[8] When a vendor agrees to furnish an abstract, the agreement means "an abstract of the records in the recorder's office and of all the records showing his title to the real

most total annihilation of many of the old common-law rules relative to the acquisition and transfer of estates in land, have caused a wide departure from the conventional system expounded by Preston, Moore and other English writers, as well as that now, or formerly, used in the Colonial States. The American abstract is not prepared from the original documents, but from recorded evidences thereof found in the offices of registration, courts, and other legal depositories, and, as a rule, shows only such title as is deducible of record. It is not identical with the English "abstract," as will be seen, and by way of distinction is frequently termed an "examination." Both terms, however, are used interchangeably by the profession and are practically synonymous.

In compiling an abstract, the examiner simply collects, condenses, and arranges the information found of record, without any expression as to the rights of any of the parties named therein. The work is then turned over to counsel who critically examines each instrument shown, or statement made; decides upon the sufficiency and legal effect of the conveyances, noting any defects or irregularities therein, or in any of the proceedings necessary to divest or acquire title; determines the relative rights and legal relations of the parties to the land in question and to each other; and finally formulates his views in a written opinion which is annexed to the abstract, and on the strength of which future sales or other dispositions of the property are usually made." Warvelle, Abstracts, §§ 3-6.

[8] Smith v. Taylor, 82 Cal. 533, 23 Pac. 217.

estate."[4] It is a statement in substance of the matters appearing in the public records affecting the title to real property.[5] If the vendor agrees to furnish a complete abstract down to date, showing a good title, and if, when he furnishes the abstract, he had no title of record, the vendee is excused from performance, though subsequently a sufficient deed to the vendor is exhibited to the vendee. The vendee could not know, when the abstract was not brought down to date, what liens might exist while title was in the vendor.[6]

§ 1533. Deed merging contract to deliver abstract at a future date.—If a contract for the sale and conveyance of real property provides that the vendor shall deliver at a future date an abstract showing that he has good title, which shall be satisfactory to the vendee's attorney, the question whether this provision is merged in a warranty deed executed by the vendor, and a mortgage executed by the vendee to secure the payment of the purchase price, both of which instruments were executed at the same time as the contract, is to be decided by an examination of the instruments and

[4] Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340.

[5] Union Safe Deposit Co. v. Chisholm, 31 Ill. App. 647. In Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979, it is said that an abstract of title means a statement in substance of what appears on the public records affecting the title and also a statement in substance of those facts which do not appear on the public records necessary to perfect the title. See, also, Dickinson v. Chesapeake R. Co., 7 W. Va. 390; Loring v. Oxford, 18 Tex. Civ. App. 415, 45 S. W. 395; Tasker v. Garrett County, 82 Md. 150, 33 Atl. 407. "An abstract of title is a summary of the most important parts of deeds and other instruments composing the evidences of a title to real estate, arranged usually in chronological order, and intended to show the origin, cause, and incidents of the title, without the necessity of referring to the deeds themselves. It also contains a statement of all charges incumbrances, liens and liabilities to which the property may be subjected, and of which it is in any way material for purchasers to be apprised": Banker v. Caldwell, 3 Minn. 94; Burrill Law Dict. (abstract).

[6] Drury v. Mickelberry, 129 S. W. 237.

by a consideration of the situation, conduct and intention of the parties. The deed will supersede the provision in the contract, if it is accepted as a performance of that condition, but the provision will not be merged in the deed if it is agreed and intended by the parties that this provision as to the delivery of the abstract is to continue in full force and effect.[7]

§ 1534. **Waiver of objections to title by taking possession.**—The question whether or not a vendee has waived objections to the title is one of fact. If a contract of sale provides that an abstract shall be delivered in the future, which will show a good title in the vendor, satisfactory to the attorney for the vendee, the fact that the vendee has taken possession of the property and made improvements upon it, is not conclusive evidence that he has waived the stipulation as to title; particularly so, when such improvements have been made pursuant to an express stipulation of the contract.[8] If, in accordance with the contract, an abstract is delivered to the attorney for the vendee, who made objections, in good faith, and the vendor, for the purposes of removing one of these objections, promises to prosecute an action to quiet title, the vendee by continuing in possession for a reasonable time in reliance upon this promise, without seeking rescission, is not guilty of such laches as will neces-

[7] Read v. Loftus, 82 Kan. 485, 108 Pac. 850. Mr. Justice Benson cites Hampe v. Higgins, 74 Kan. 296, 85 Pac. 1019, to the effect that a written contract for the sale of real estate is superseded and extinguished by a subsequent deed between the same parties, covering all the provisions of the contract, and also with approval, § 850a of this treatise. The court declared that it could not be said "as a matter of law that the contract was merged in the deed. No inconsistency appears between the contract and the deed, and the provisions of the former were not necessarily superseded by the latter: Witbeck v. Waine, 16 N. Y. 532; Nothe v. Nomer, 54 Conn. 326, 8 Atl. 134; Close v. Zell, 141 Pa. 390, 21 Atl. 770, 23 Am. St. Rep. 296."

[8] Read v. Loftus, 82 Kan. 485, 108 Pac. 850.

sarily prevent a rescission, demand for which was made, after the vendor had refused to take any proceeding to obviate the objection. But in determining whether a rescission should be adjudged or not, the facts that possession was taken and improvements made, and that there was a delay in asking for a rescission caused by the vendor's acts and promises, while they do not constitute, as a legal proposition, a waiver of the stipulation that good title should be given, are, nevertheless, proper to be considered in the decision of the ultimate question whether a decree awarding or refusing a rescission should be made.[9] Where a contract for the sale of mines required the vendor to deliver to the vendee, a corporation, sufficient abstract of title showing clear title in the vendor, and where abstracts were delivered to the corporation which took possession of the property, and nearly three years after the execution of the contract the stockholders exchanged the property acquired and the stock in the corporation for other property,

[9] Read v. Loftus, 82 Kan. 485, 108 Pac. 850. The court said that it was "not called upon to determine the validity of the objections made to the title." "The parties by their contract agree that the title should be made satisfactory to the vendee's attorney. This was not done. Objections which appear upon their face to be substantial were made and were not removed, and a final refusal to obviate them was given. That they were made in good faith is found by the court. That such a stipulation is valid and will be enforced is not an open question in this state: Hollingsworth v. Collhurst, 78 Kan. 455, 18 L.R.A.(N.S.) 741, 96 Pac. 851. The vendee was not required to accept a title, which he had been advised was defective, and incur the risk of litigation, expense, and loss. He had provided against such hazards by a stipulation that the title should be satisfactory to the attorney. . . .

"Another contention of the defendant is that the evidence disclosed the fact that the vendee, before entering into the contract consulted with an attorney concerning the condition of the title, and that he must have relied upon the advice of the attorney. It is sufficient to say that, notwithstanding such consultation, he made these stipulations with reference to the title. Whatever advice he may have received, he had a right to secure such guarantees and make such conditions as the other party was willing to concede."

it must be held that there was an acceptance on the part of the corporation of the title to the mines as a sufficient compliance with the terms of the contract.[1] If the owner of mining property agrees to convey it to a corporation and to deliver to such corporation sufficient abstracts of title to the property, there is no obligation on him to deliver an abstract to any person subscribing for the capital stock who may have contracted to pay the owner a certain sum in consideration of the execution of the deed to the corporation.[2]

§ 1535. **Furnishing abstract in absence of agreement.** —Generally, the contract of sale provides that the vendor shall, within a stipulated time, furnish an abstract of title, but if there is no such agreement, it is incumbent upon the purchaser to provide the abstract and to satisfy himself as to the conditions of the title.[3] As titles to real estate in the

[1] Thornburg v. Doolittle, (Iowa,) 125 N. W. 1003.

[2] Thornburg v. Doolittle, (Iowa,) 125 N. W. 1003.

[3] Easton v. Montgomery, 90 Cal. 307, 27 Pac. 820, 25 Am. St. Rep. 123; Carr v. Roach, 2 Duer, 20; Esky v. Anderson, 14 Pa. St. 312; Syms v. Cutler, 9 Kan. App. 210, 59 Pac. 671. In Easton v. Montgomery, 90 Cal. 307, 27 Pac. 820, 25 Am. St. Rep. 123, the court speaking through Mr. Justice Harrison, said that the purchaser "was not at liberty, however, to pronounce the title defective without any examination, or upon a partial examination. Having assumed to examine the title for the purpose of determining whether it was good, it was incumbent upon him to make a complete examination thereof. He could call upon the defendants for any information with reference thereto, and it then became their duty to furnish such information as they possessed: Benson v. Shotwell, 87 Cal. 49. If, upon such examination, it appeared to him that the title was defective, it then became his duty to report to the vendor the particulars wherein such defects were claimed to exist, and in the absence of any time fixed by the agreement within which the vendor should remove these defects, or satisfy his objections, a reasonable time would be allowed therefor: More v. Smedburg, 8 Paige, 600. The burden is on the vendee to point out the defects in the title: Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105. If the vendor fails within such time to remedy the defects thus pointed out, the purchaser in any action to recover the purchase money or deposit paid by him

United States are of record the doctrine of *cuveat emptor* applies. "In the absence of any special agreement, the purchaser must look for himself to the records for the validity of the title to lands he would purchase." [4] Where a contract is entered into binding the vendor to furnish a perfect title to the land sold, the contract is complied with by a deed conveying a good and perfect title, and the vendor is not obliged to furnish an abstract showing a perfect title.[5] To authorize the vendor to recover the purchase money, where the vendee fails to complete the purchase, a tender of a deed is sufficient. It is not necessary to tender the whole chain of title.[6] "In many cases," said Mr. Justice Coultes, "this would be absolutely impossible; as, for instance, when a patent covers a large tract of land which is subsequently divided into many parts, which is extremely common, the owner of every part cannot have the original patent; and, so, in relation to a deed from an individual for a large tract afterwards divided into parcels, the owner of each parcel cannot have the original deed; and in this country, where titles are on record, it is of no consequence, because the vendee can resort to the record for information as to the title. The rule is *caveat emptor*. It is the duty, therefore, of a purchaser to examine for himself. The defendant is not bound to accept a doubtful title, but it is his business to show that it is doubtful, or positively bad. In England, it is customary to give to the vendee an abstract of the title, but that is not usual here. It is common, however to recite the chain of title in the preamble to the deed." [7]

upon the ground that the title is defective, is limited to such defects as were then pointed out: 1 Chitty on Contracts, 434; Todd v. Hoggart, M. & M. 128."

[4] Syms v. Cutler, 9 Kan. App. 210, 59 Pac. 671.

[5] Smith v. First Nat. Bank of Flatonia, (Tex.) 95 S. W. 1111.

[6] Espy v. Anderson, 14 Pa. St. 308.

[7] Espy v. Anderson, 14 Pa. St. 308. "In the United States the changed conditions of the evidences of title, the system of registration, the actual and constructive notice imparted thereby, and the access which the purchaser has to infor-

§ 1536. Broker's agreement to furnish abstract.—If an owner is not required to furnish an abstract, a real estate broker employed to find a purchaser for the property, under a contract, which authorizes him to do this at a stipulated price, has no power, in a sale made by him as agent, to place upon the owner, as a condition of the sale, an obligation to supply an abstract of title.[8] If a real estate agent attempts to collect his commission for a sale made by him under the owner's authority, he must prove that the sale was made on the terms and conditions specified in his contract.[9] The owner is not bound by a departure from the terms given to an agent by his principal.[1]

§ 1537. As regulated by usage.—In some cases it is held that a vendor must furnish evidence of his title, and

mation concerning the title, would seem to render inoperative the English rule by removing the reason which occasioned it; and, while it is customary in this country, as in England, for the vendor to prepare and furnish an abstract of title, either pending or after consummation of the sale, it does not appear that this can be demanded as a matter of right, but is rather the result of the contract or conditions of sale. In England, where titles are not registered, the vendor, in order to show performance or an offer to perform on his part, whether in an action at law for the purchase money or a suit in equity to compel performance by the vendee, must affirmatively prove his title. In this country, where titles are matters of record, and at all times open for inspection, a different rule prevails": Warvelle, Abstracts, § 11, pp. 12–13.

[8] Hunt v. Tuttle, 133 Iowa, 647, 110 N. W. 1026.

[9] Balkema v. Searle, 116 Iowa, 374, 89 N. W. 1087; Smith v. Allen, 101 Iowa, 608, 70 N. W. 694; Blodgett v. Sioux City St. P. R. Co., 63 Iowa, 106, 19 N. W. 799.

[1] Balkema v. Searle, 116 Iowa, 374, 89 N. W. 1087. Where his authority is merely to find a purchaser he has no right to enter into a contract of present sale in the name of his principal: Balkema v. Searle, 116 Iowa, 374, 89 N. W. 1087; Stewart v. Pickering, 73 Iowa, 652, 35 N. W. 690; Furst v. Tweed, 93 Iowa, 300, 61 N. W. 857; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Armstrong v. Lowe, 76 Cal. 116, 18 Pac. 758; Morris v. Ruddy, 20 N. J. Eq. 236; Halsey v. Monteiro, (Va.), 24 S. E. 258; Ballou v. Bergvendsen, (N. D.), 83 N. W. 10.

that this, by usage, is done by an abstract.[2] In Alabama it was held, at an early day, to be the duty of a purchaser of land to prepare and tender to the vendor the deed which the latter was required to execute. "But it is incumbent on him," said the court, "to furnish, when required an abstract of his title to the buyer." [3] If the contract between vendor and vendee contains a provision that the abstract shall be delivered within a reasonable time, the question of what time is reasonable, within the meaning of this provision, is dependent upon the circumstances of the transaction. Although the contract may provide that a payment shall be made at a specified time, it does not follow that delivery of the abstract must be made before that time.[4] If a merchantable abstract is to be furnished, and one is supplied by the county recorder, and a number of witnesses testify that such an abstract is merchantable, the statement of the witnesses that they had occasionally heard objections to the recorder's abstracts will not cause a finding to be disturbed, that the delivery of such an abstract is a compliance with the stipulation to furnish a merchantable abstract.[5] It is generally provided specially in agreements of sale that the vendor shall supply an abstract of title.[6]

[2] Brewer v. Fox, 62 Ill. App. 609.

[3] Chapman v. Lee, 55 Ala. 623.

[4] Jackson v. Conlin, 50 Ill. App. 538.

[5] Harper v. Tidholm, 155 Ill. 370, 40 N. E. 575.

[6] Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Boas v. Farrington, 85 Cal. 535, 24 Pac. 787; Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 399; Kane v. Rippy, 24 Or. 338, 33 Pac. 936; Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504; Loring v. Oxford, 18 Tex. Civ. App. 415, 45 S. W. 395; Hale v. Cravener, 128 Ill. 408, 21 N. E. 534; Mead v. Altgeld, 136 Ill. 298, 26 N. E. 398; Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686; Eberhardt v. Miller, 71 Ill. App. 215; Union Safe Deposit Co. v. Chisholm, 33 Ill. App. 647; Constantine v. East, 8 Ind. App. 291, 35 N. E. 844; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Johnston v. Johnson, 43 Minn. 5, 44 N. W. 688; Lessenich, v. Sellers, 119 Iowa, 314, 93 N. W. 348; Consolidated Coal Co. v. Findley, 128 Iowa, 696, 105 N. W. 206.

§ 1538. **Abstracts in suits to try title.**—If a statute provides that in ejectment suits an abstract may be demanded, it is not to be construed as requiring the production of an abstract in the technical sense. It is sufficient if, in answer to a demand for an abstract, one is furnished which is specific enough to advise the opposite party of the title upon which reliance will be placed.[7] The statute of Texas provides that either party in an action of trespass to try title may demand from the other party an abstract of the claim or title on which he bases his title. If the party upon whom demand is made fails to comply, no evidence of title can be given on the trial. If, in attempted compliance with such a demand, the plaintiff files an abstract in which it is stated that a deed in his chain of title had been recorded in records of deeds in volume 5, while in fact it is recorded in a book lettered V, the deed, it is held under this statute, cannot be introduced in evidence.[8]

[7] Jackson v. Tribble, (Ala.), 47 South, 310. In that case the abstract was as follows: "'I, as attorney for George Tribble, beg to submit you the following abstract of title as per your demand on the 24th inst.: United States to Joseph Shackleford, entry, 1855; J. H. Shackleford and wife to James Massey, deed, 1857; James Massey by John McDonald, administrator to W. F. Fulton, deed, 1878; W. F. Fulton, to A. Beers and Robert Stephens, deed, 1852; A. Beers to Robert Stephens, deed, 1883; Robert Stephens to M. T. Sumner, deed, 1884; Frank and Sophie Jackson, to George Tribble, mortgage, 1903; George Tribble, mortgage, to George Tribble, foreclosure deed, 1906." The court said that it was of the opinion "that the abstract furnished in this case is sufficiently specific to cover the mortgage from the defendant to the plaintiff and the deed executed by the mortgagee, and that the trial court committed no error in overruling the objections thereto on this ground."

[8] Coler v. Alexander, (Tex.), 128 S. W. 664. On this point this point Mr. Justice McMeans in delivering the opinion of the court, said: "The articles of the statutes referred to provide in substance, that either party may demand of the other an abstract in writing of the claim of title upon which he relies, which must be filed within a specified time, and in default thereof no evidence of the title of such opposite party shall be given on the trial. The abstract is required to contain a statement among other things of the book and page where the instrument relied upon is recovered. A com-

But if an intervenor made no demand on the plaintiff for an abstract, the deed can be introduced in evidence as against the intervenor.[9] Under the statute of Indiana the court may "in all proper cases, upon motion, order a bill of particulars of the claim of either party, and abstracts of title to be furnished." [1] Such abstracts, however, do not become when furnished, a part of the pleading.[2]

§ 1539. **Abstract where records destroyed by fire.**— In Illinois the statute provides that "whenever, upon the trial of any suit or proceeding which is now or may hereafter be pending in any court in this state, any party to such suit or proceding, or his agent or his attorney in his behalf, shall orally in court, or by affidavit to be filed in such cause testify and state under oath that the originals of any deeds or other instruments in writing, or records of any court relating to any lands, the title or any interest therein, being in controversy in such suit or proceeding, are lost or destroyed, or not within the power of the party to produce the same, and that the records thereof are destroyed by fire or otherwise, it shall

pliance with this requirement is important, because its evident purpose is to furnish the adversary such information as will enable him, by investigation of the book and page of the record to ascertain the exact character of the instrument relied upon, and thereby enable him to prepare his defense as against the evidence which he is thus informed the other party will adduce upon the trial, and it would be manifestly unfair, and opposed to the spirit of the statute to permit the introduction of a deed, the record of which was in a different book from that stated in the abstract."

It would seem to the author that the abstract should not have been excluded because the opposite party in no way could have been misled. The information given to him for all practical purposes was as full as if the Roman numeral had been used for the Arabic one. The statute should be liberally construed so as not to deprive a party to the suit from introducing competent evidence when the notice to the other party is sufficient to inform him.

[9] Coler v. Alexander, (Tex.), 128 S. W. 664.

[1] Burns Ann. St., 1908, § 369.

[2] O'Mara v. McCarthy, (Ind.), 90 N. E. 330.

be lawful for such party to offer, and the court shall receive as evidence, any abstract of title, or letter- press copy thereof, made in the ordinary course of business prior to such loss or destruction." [3] Before an abstract can be received in evidence, under this statute, the requirements of the statute must be complied with. An affidavit which states that the original documents referred to in a certified abstract are not in the possession of the complainant and "that they have been either lost or destroyed, and it is not in the power of the complainant to produce them," is sufficient to lay the foundation for the introduction of the abstract in evidence, under the statute quoted, because the affidavit omits to state the fact of the loss of the records of the instruments.[4]

§ 1540. Delivery of abstract.—If no time is fixed in the contract of sale for the delivery of the abstract, it may be delivered within a reasonable time. "By the terms of the contract" said the court on this point, "the defendant was to furnish the vendee an abstract showing good and sufficient title; and, while no particular time therefor was fixed, the law requires that it be furnished in reasonable time for examination before the contract is to be performed." [5] Under a contract requiring the vendor to furnish an abstract within a reasonable time, he is not necessarily required to furnish it within thirty-five days, although the contract specifies that time for the first payment of the purchase price by the vendee.[6] Where a contract for the exchange of lands provides that an abstract showing a good title shall be furnished before a fixed time, and where the vendor furnishes an abstract that does not show a good title, he has no right to demand an extension of time in which to furnish an additional abstract.

[3] Hurd's Rev. Stat. 1908, § 24, p. 116.

[4] Bauer v. Glos, 244 Ill. 627, 91 N. E. 701.

[5] Martin v. Roberts, 127 Iowa, 218, 102 N. W. 1126.

[6] Jackson v. Conlin, 50 Ill. App. 538.

The purchaser may refuse to grant the extension demanded, and in case he does so, the refusal of the vendor to perform his part of the contract in failing to supply an abstract in the time stipulated will terminate the contract.[7] If a vendor agrees to furnish within a stipulated time an abstract showing a perfect title, he is required to furnish a marketable title, notwithstanding the delivery of his deed.[8] A contract required that "an abstract of title to said premises should be furnished without delay." In an action to compel specific performance the breach of the agreement was thus alleged: "That, pursuant to the terms of said agreement, the defendant was to deliver to the plaintiff an abstract of title to said premises, and, although said abstract has been duly demanded, the same has not been delivered." The complaint did not allege a refusal to deliver, and the question presented by the pleading was whether, as a matter of law, the failure to deliver was a breach of the contract. It appeared that the contract was dated February 15th, the complaint was verified on February 23d, and was personally served on the 27th of that month. The court said: "On this state of the record all the plaintiff could have proved would have been the fact of demand and non delivery. If the court could not presume that this delivery was not within a reasonable time, the plaintiff could not have made out a case. We do think that a court could not so presume. The complaint, therefore, failed to allege a breach, and was demurrable."[9]

[7] Howe v. Hutchinson, 105 Ill. 501.

[8] Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

[9] Cummings v. Wilson, 99 Minn. 504, 110 N. W. 4. In that case Mr. Justice Lewis dissented, and said: "I think the complaint when considered in connection with the contract fairly alleges that the respondent made a demand upon appellant for the delivery of the abstract; that such demand was refused, and the abstract was not delivered and, inasmuch as the contract provided that the abstract should be furnished without delay, it was entirely a matter of defense, if the demand for the abstract was made sooner than contemplated. An abstract may already have been made. There may have been good

§ 1541. **Tender of abstract after agreed time.**—If the vendee desires to insist that the contract of sale has not been performed because the vendor has not delivered the abstract stipulated for in the contract, within the time limited, he must refuse to accept the abstract, if tendered to him after the expiration of that period. If he accepts the abstract after that time, he waives his right to claim that the delay in delivery operated to terminate the contract. Where a contract provided that the vendor should deliver an abstract within ten days from the signing of the contract, but he did not do so until after the expiration of this time, Circuit Judge Lurton, now a Justice of the Supreme Court of the United States, said: "The effect of the fact that the abstract was not delivered within ten days after sale has been waived by the acceptance of it, when delivered, without objction, and its retention for months without specifically referring to any other defects in the title than those amendable by the steps taken in the county court suggested by the buyer's counsel as necessary to perfect title." [1] The vendee cannot treat the default at the time at which it occurs as immaterial and subsequently urge it as a ground for a rescission of the contract.[2] If the contract of sale provides that an abstract shall be furnished within thirty days, and this stipulation is not performed within this time, but the purchaser continues to make payments under the contract and shows by his acts that he still considers it effective, he will be deemed to have waived the per-

reason for speedily closing the deal, and it should not be assumed that several days would be required to secure an abstract from the register of deed's office. At any rate, if such was the fact, it was purely defensive matter. I find no difficulty in concluding that the complaint states facts sufficient to constitute a cause of action."

[1] Kentucky Distilleries & Warehouse Co. v. Blanton, 149 Fed. 31, 80 C. C. A. 343. See, also, Pincke v. Curteis, 4 Bro. C. C. (Eng.) 329; Upperton v. Nickolson, L. R. 6 Ch. (Eng.) 436; Seton v. Slade, 7 Ves. (Eng.) 265.

[2] McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 339.

formance of that stipulation.[3] In case the seller who agrees to furnish an abstract gives notice where it may be found and inspected, the failure of the seller to furnish the abstract, when no objection is urged at the time, will not justify rescission by the purchaser. Where the contract of sale does not so provide, the purchaser cannot claim the right to a personal inspection of the deed before making payment.[4]

§ 1542. **Refusal to furnish abstract.**—If a person has an option for the purchase of land, and in the contract between him and the seller it is provided that the latter shall furnish an abstract of title, the latter, in case he breaks this part of the contract, is liable in damages to the amount that is the difference between the contract price and the value of the land.[5] The issue cannot be raised in such a controversy whether or not the vendee would have purchased the land in case the vendor had furnished the abstract as agreed. Such an issue is clearly speculative and immaterial on the question of the vendor's liability.[6] "The vendor" said Circuit Judge Sanborn, "had covenanted to deliver to him a correct ab-

[3] McAlpine v. Reicheneker, 56 Kan. 100, 42 Pac. 339. Said the court, per Mr. Justice Johnston: "It is now insisted that as Mrs. Reicheneker failed to tender an abstract of title within the specified time, did not produce to plaintiff's attorney the authority to convey the land, and did not procure the measurement of the same, she was first in default, and, therefor the plaintiff was entitled to have the money advanced refunded. While the agreement required her to furnish an abstract of title within thirty days, it is clear that this condition of the contract was waived by the plaintiff. He made two payments to her, and procured an extension of time to make other payments, several months after the time when the abstract was to be furnished. He says that he was well acquainted with the title to that he deemed the provision relative to an abstract to be immaterial, and both of the parties treated the contract as still in force until after the lapse of the extended time. The performance with reference to abstract was effectually waived by the plaintiff."

[4] Papin v. Goodrich, 103 Ill. 86.

[5] Hampton Stave Co. v. Gardner, 154 Fed. 805, 83 C. C. A. 521.

[6] Hampton Stave Co. v. Gardner, 154 Fed. 805, 83 C. C. A. 521.

stract within a reasonable time, and the vendee had the right to rely upon the performance of this covenant by the vendor and to state his option upon it. He was not required to presume that the vendor would violate his agreement and to act and procure an abstract for himself upon that assumption. Nor was the cost of such an abstract, the probable effect of the vendor's failure to furnish one. The measure of damages for its breach of this covenant in the contract was the natural and probable loss which the vendee would sustain on account of that breach, and that was the value of the option, the difference between the value and the contract price of the land, and the vendor could not lawfully take advantage of its own wrong by proof that the vendee would not have realized this value if it had performed its covenant." [7]

§ 1543. **Reference to records.**—Where a purchaser paid a part of the consideration, and agreed to pay the balance on or before a fixed date on the delivery of "a warranty deed conveying clear title with abstract," the delivery of an abstract showing a perfect title is a condition precedent. If it is not furnished, the purchaser can recover the part of the purchase price which he has paid.[8] At the trial the vendor attempted to show that although the title was defective as shown by the abstract still he had a complete and perfect title to the property. But said the court: "We cannot agree with this contention. The contract was to furnish an abstract of title, and such abstract should contain whatever concerns the sources of the title, and its conditions. Not only should the descent and line of the title be clearly traced out, and all incumbrances, all chances of eviction, or adverse claims, should be shown, but material parts of all patents, deeds wills, judicial proceedings, and other records or documents which touch the title, and also liens and incumbrances of every

[7] Hampton Stave Co. v. Gardner, 154 Fed. 805, 83 C. C. A. 521.

[8] Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

nature, should be set forth. And in every contract for the sale of real estate it is implied that the seller will, before the completion of the contract, show a good marketable title The object of the abstract is to enable the purchaser or his counsel to pass more readily on the sufficiency of the title." [9] Mr. Justice Lord, of the Supreme Court of Oregon, after stating that the object of an abstract is "to enable the purchaser or his counsel to pass readily on the validity of the title, as it should contain whatever concerns its source and condition,"[1] adopts this language from Mr. Curwen: "The object of the abstract is to furnish the buyer and his counsel with a statement of every fact and abstract of the contents of every deed on record, upon which the validity and marketableness of the title depend, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each conveyance as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence shall be required. The buyer has a right to demand a marketable title. He has a right to demand that the abstract of title shall disclose such evidence of that title as will enable him to defeat any action to recover or incumber the land,"[2] In a case in Texas, the trial court gave as a portion of its charge the following: "By an 'abstract' is meant a statement, in substance, of what appears on the public records affecting the title, and also a statement, in substance, of such facts as do not appear upon the public records which are necessary to perfect the title." On appeal the court said: "We regard the definition given by the court as substantially correct, though not a full and comprehensive

[9] Taylor v. Williams, 2 Colo. App. 559, 31 Pac. 504.

[1] Kane v. Rippy, 22 Or. 296, 23 Pac. 180.

[2] Kane v. Rippy, 22 Or. 296, 23 Pac. 180, citing Curwen, Abstracts, § 36.

definition," but held that no material error was committed in giving it.[3]

§ 1544. **Full search should be made.**—The searcher should make a full and true search and examination of the records and should note upon the abstract accurately every transfer, conveyance, or other instrument of record in any manner affecting the title.[4] It is probably a matter for his own decision as to how full or minute a description of them he should give. But he is required to exercise due care and skill that the description of the instruments shall be accurate to the extent, at least, that he attempts to describe them. The record determines the effect to be given to a conveyance and he cannot content himself by assuming the accuracy of marginal references to the conveyances without examining the instruments themselves. "Any other rule would render abstracts of title so unreliable as to be of little value." [5] If he relies upon the marginal references he does so as his risk, and is liable in damages to a person employing him, if his omission to examine the original records has caused his employer a loss.[6]

[3] Hollefield v. Landrum, 31 Tex. Civ. App. 187, 71 S. W. 979. The court adopted as correct the definition given in 1 Am. & Eng. Enc. Law (2d ed.) p. 210, that "an abstract of title . . . is a short and methodical summary of the documents and facts which affect the title to a piece of land" and remarked that this definition also accorded with the views of Mr. Maupin, as expressed in his work on Marketable Titles, p. 159, § 71.

[4] Wakefield v. Chowen, 26 Minn. 379.

[5] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502. "An examination, upon its face, purports to show the course of title from a definite date to another definite date, and the fair and reasonable import of the undertaking is, that the examiner has made a full and true search relative to the title during that period and has noted on the abstract every transfer, or other matter, affecting the same, actually made and entered of record between those dates." Warvelle, Abstracts, § 90, p. 102.

[6] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

§ 1545. **Abstract showing good title.**—If a seller agrees to convey to the purchaser "by warranty deed with abstract showing good title," this clause refers to the record title, which may be epitomized in the abstract.[7] In such a case, where the contract requires an abstract showing good title, the seller must comply with his contract. "Nothing less than this," said Mr. Chief Justice Sherwin, "would satisfy the condition, no matter what the vendor's real title might be. This was a condition precedent to be performed by the vendor before he could require further action on the part of the vendee, and the burden of proof is upon him to show that he, in fact, complied therewith."[8] A contract for the sale of land provided: "Ten days given to examine title; and if, upon examination of the records, it shall appear that any material act or thing is necessary to be done or performed in order to perfect the title to said premises, which the seller is unable to do or perform within a reasonable time, not exceeding sixty days from date hereof, then the sale to be void at the option of either party." The title of the seller depended solely on adverse possession. In a suit in equity to compel the specific performance of the contract the court held that the purchaser was not required to accept the title.[9] A court of equity

[7] Fagan v. Hook, 134 Iowa, 381, 105 N. W. 157.

[8] Brown v. Wilden, (Iowa), 103 N. W. 158. See, also, Lessenich v. Sellers, 119 Iowa, 314, 93 N. W. 348; Martin v. Roberts, — (Iowa), 102 N. W. 1126; Spooner v. Cross, 102 N. W. 1119; Noyes v. Johnson, 31 N. E. 767; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Heller v. Cohen, 48 N. E. 527; Zunker v. Kuehn, 88 N. W. 605; Bruce v. Wolf, (Mo.), 76 S. W. 723.

[9] Noyes v. Johnson, 139 Mass. 436, 31 N. E. 767. "By the terms and conditions of the sale" said the court in that case "it was implied that the purchaser should have a good title by record. No purchaser could reasonably be held to expect, from these terms and conditions, that a title by adverse possession, depending upon a long and difficult investigation of facts, would be offered to him. The title may be good; but a purchaser under such terms and conditions ought not to be held bound to accept it, and assume the burden of defending it against all comers."

will not compel a purchaser to accept a title that is not clear or to assume the risk of subsequent litigation.[1] Where the agreement of the seller is to convey a perfect title, it should be fairly deducible of record. There should be no reasonable doubt as to its validity and it should be "free from litigation, palpable defects and grave doubts, and should consist of both legal and equitable titles." [2]

§ 1546. **Right to inspect public records.**— At common law a person had no right to examine the public records unless he had some interest for which the record might be used as evidence. "At common law parties had no vested rights in the examination of a record of title or other public records, save by some interest in the land or subject of record." [3] An application was made for a writ of mandamus to compel the register of deeds to permit the applicant to make a set of abstracts of title as shown by the records in his office. The statute under which he claimed the right to make the examination provided that: "Every county officer shall keep his office at the seat of justice of his county and in the office provided by the county, if any such has been provided; and if there be none established, then at such place as shall be fixed by special provisions of law; or if there be no such provisions, then at such place as the board of county commis-

[1] Butts v. Andrews, 136 Mass. 221; Cunningham v. Blake, 121 Mass. 333.

[2] Sheehy v. Miles, 93 Cal. 288; Turner v. McDonald, 76 Cal. 177.

[3] Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245. See to the same effect: Lum v. McCarty, 39 N. J. L. 287; Sloan Filter Co. v. El Paso Reduction Co., 117 Fed. 504; Brewer v. Watson, 71 Ala. 299, 12 Atl. 405; Belt v. Prince George's County Abstract Co., 73 Md. 289, 10 L.R.A. 212, 20 Atl. 982; State v. King, 154 Ind. 621, 57 N. E. 535; State v. McCubrey, 84 Minn. 439, 87 N. W. 1126; Daly v. Dimock, 55 Conn. 579, 12 Atl. 405; In re Marriage License Docket, 4 Pa. Dist. 162; Commonwealth v. Walton, 6 Pa. Dist. 287; Owens v. Woolridge, 27 Pa. Co. Ct. 237; Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927; In re Caswell, 18 R. I. 835, 27 L.R.A. 82, 20 Atl. 259, 49 Am. St. Rep. 814. See, also, Warvelle, Abstracts, § 60 p. 69.

sioners shall direct; and they shall each keep the same open during the usual business hours of each day (Sundays excepted); and all books and papers required to be in their offices shall be open for the examination of any person." The court held that the applicant had no right, under this statute to make copies of the entire records for the purpose of making a set of abstract books. "The examination allowed by the statute was intended," said the court, "for persons who desired some information that could be readily gained by personal inspection of the records. The duty of granting this right is imposed upon the register, but it was never intended that the inspection would give the right to make entire copies of the records, and consume his time in watching and protecting the records during the time required to take an abstract of the titles of land in any county. This right of inspection would be exercised only by persons who had an interest in the record, or by some one for them, for the purpose of information, and was not intended to give a right to parties to engage in private speculation in connection with the information there received." [4] A similar statute was construed in Colorado as

[4] Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245. The court in the course of its opinion spoke of the object of keeping a record of the titles to land and said: "The primary purpose of making and keeping a record of the titles to land is that the title and its history may be preserved and protected, so that the information there contained may be obtained by those who seek it. Without these records there would soon be that uncertainty in the title to real estate that would render it almost valueless, or involve its owners in endless litigation to protect it. Necessity then requires that these records shall be correctly made, and when so made to be safely and securely kept. The law has imposed this duty upon the register of deeds, and when any persons desire to inspect the same, that inspection must be under the immediate eye and observation of the register of deeds or his deputy. Otherwise that provision of the law that requires him to "safely keep" would impose a duty without the power to perform it. Then the right to inspect must of necessity have some restrictions, and must be done under such rules as the register may fairly impose, that will tend to the safety and preservation of his trust. The right claimed by the plaintiff for himself and for

not designed to allow persons desiring to abstract the entire records of a county for their future profit to monopolize, for a long period, the time and attention of the custodian of the records.[5]

every person to inspect the records at will, and make copies therefrom, must of equal necessity be governed. If this right exists, it exists for all. If the plaintiff may make abstracts of the records and copies therefrom, then others have that same right. Should two or more desire to make an examination at the same time who is to decide which shall make the examination or abstract first, or the length of time to be occupied in making that abstract? With the right come things incidental to that right; facilities for making the copies desired. If no decision or direction is to be made, then each may pursue his work at the same time, and this must be done under the immediate observation of the register. He must either superintend and watch over this work, or furnish suitable deputies to do so. The records must be preserved and safely kept. If this construction was to be given, the public would be called upon to furnish greater facilities for the register of deeds and those desiring to make abstracts in his office; and a large expense would be incurred to carry on a work in which the public had no special interest or benefit; it would be enabling private individuals to engage in speculation for gain at the public expense. In large and populous counties the demand for the right to make abstracts would be great, and much time consumed in their making; and, instead of having an office where the records were to be kept for public inspection, it would be converted largely into an office for private individuals, for private and not for public use; and, if this right is granted, then could it be denied in any other department of county or state government? The records would be free to be inspected and copied for any and all purposes; for when the right is conceded for private use or inspection, then it is conceded to be equally open for him who examines for idle curiosity or unlawful purposes. If you grant this right to one citizen you must grant it to another. No distinction can be made between the good citizen and the bad. Both must have the same facilities and the same right, independent of the purpose for which the information is sought."

[5] Bean v. The People, 7 Colo. 202, 2 Pac. 909. The court on this subject said: "The cardinal rule of statutory construction is to discover and declare the intent of the law-makers. Counsel for the defendants in error contend that the section above mentioned needs and will admit of no construction. That the words "any person" used therein include each and every individual who may choose to demand an inspection of the county records. But we are not prepared

§ 1547. No common law right to make copies for abstract books.—In a case in Michigan the court decided that there was no right at common law to make copies or

to accept this conclusion; we feel confident that an examination of the statute is proper, with the view of determining whether or not the legislature intended to grant the privilege here claimed. Relators in this case assert the right, under the law, to examine and abstract the entire records of Gunnison County for the sole purpose of securing future private emolument from the sale of abstracts thus obtained; they do not seek information concerning a tract of land in which they themselves, or parties whom they represent, have or expect to have an interest. Their business is permanent; to carry it on successfully they must not only, by themselves or agents, occupy the clerk's office for weeks, perhaps months, in abstracting the instruments now recorded, but they must also be there daily thereafter, abstracting the conveyances filed from day to day. Their interruption and annoyance of the clerk are not temporary; they are continuing and permanent. It matters not that relators require no aid from him; for he is charged by statute with the safe keeping and preservation of the records; he is responsible for their truthfulness and freedom from mutilation; a single stroke of the pen, the erasure or addition of a single word may change the character of a conveyance, or destroy the most valuable property-right. The clerk is unfaithful to his trust if he allow one of the record books to remain for an instant in the hands of a stranger out of his sight. If he performs his whole duty he must watch, each and every person who examines or abstracts a single title record.

Did the legislature contemplate a business such as that or relators, and intend to impose upon the clerk these duties and responsibilities in connection therewith. Did they intend to say to him, "You must give relators, gratis, a part of your time and attention on each and every week day during your term of office?" If one person or partnership may subject him to this inconvenience, labor and annoyance, others may do the same. The abstract business is lawful, and in populous counties usually quite a number of individuals or firms engage therein. The clerk's entire time might be monopolized in this way, and yet he is allowed no compensation therefor. Our laws require the county commissioners to provide, at the expense of the county, an office for the recorder, to light and heat the same, and to furnish tables, chairs and all necessary appliances for the convenience and use of the recorded and persons transacting therein the business contemplated by statute. Did the legislature intend to furnish at public expense office and desk room, together with tables and chairs, for the permanent use and convenience of per-

abstracts of public records for a set of abstract books; that "the right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may from curiosity or otherwise desire the same but is limited to those who have some interest therein." The court pointed out some of the inconveniences that might result from allowing persons to occupy the office of the custodian of records to those who were not interested in their future preservation, and declared: "The inconveniences which such a system would ingraft upon public officers, the dangers, both of a public and private nature, which would inevitably follow in the carrying out of such a right, are conclusive against its existence thereof." [6] In a case in Georgia, the court said: "Men are re-

sons engaged in a purely private speculative enterprise?

It is urged that this business is a great public convenience and security; that parties interested may more readily, and perhaps cheaply, procure desired information and abstracts; and that in case of loss thereof by theft or fire, any portion of the records may be duplicated from the abstract office. It is answered that the clerk is required to furnish abstracts and information to those demanding the same at a compensation fixed by legislative enactment; and that it is the duty of the commissioners to provide safes and vaults sufficient to protect the records from loss and injury by fire or burglary, and it may also be added that the possession of complete abstracts by dishonest and evil-minded persons might increase the danger to the public records by offering an inducement for their destruction.

We think that the business of relators should be treated as any other legitmate private enterprise. There is no law preventing the clerks aiding them if he choses so to do, either gratis or for a stipulated compensation, provided he does not neglect his official duties. But the courts should not by mandamus compel him to do this against his will. We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the entire records for future profit in their private business the privilege of using continuously the public property and of monopolizing from day to day, for months and years, a portion of the time and attention of a public officer against his will and without recompense."

[6] Webber v. Townley, 43 Mich. 534, 5 N. W. 971. But see the later case of Burton v. Tuite, 78 Mich. 363, 7 L.R.A. 73, 44 N. W. 282, where Mr. Justice Morse who delivered the opinion of the court said that any person had the right to inspect the public records and

quired for the protection of purchasers and to secure fair dealing, to put their titles upon record, and to expose, in some respects, what they may have strong inducements to keep secret. But while the public interest thus provides a mode by which any one may learn the truth upon inquiry, it is no part of the public scheme to make this exposure universal. It provides that those who seek the information can get it, but it does not, and it ought not, to flaunt the information its records contain before the public gaze, and thus make a scandal of a public necessity. The object of the record is to furnish to those needing it the information the record contains. That object is attained when its books are open to inquiries as these occasions present themselves. The object sought by the complainant, to wit, to put the substance of these records into print, to be sold and put into the hands of any one who may chance to buy or to borrow, is an extension of this publicity beyond the necessities which make the record justifiable and is a perversion of the object sought by the requirement to record. It is an unnecessary flaunting of private matters before the public gaze." [7] In a later decision

Mr. Justice Champlin concurred in the opinion. But Mr. Justice Campbell in concurring said that the relator had such an interest as entitled him to see the book in question and confined his opinion to that point. And see, also, Day v. Button, 96 Mich. 600, 56 N. W. 3; Burton v. Reynolds, 110 Mich. 354, 68 N. W. 217; Aitcheson v. Huebner, 90 Mich. 643, 51 N. W. 634; Kalamazoo Gazette Co. v. Kalamazoo County Clerk, 148 Mich. 460, 111 N. W. 1070.

[7] Buck v. Collins, 51 Ga. 392. The court also in that case said: "No person has a right to examine or inspect the records of his office, except in his (clerk's) presence and under his observation. If he may do this for a minute, the clerk is not keeping them safely and securely. A blot or scratch may be made in a minute that may alter a record. A leaf may be abstracted in a minute; and if one man may of right take a record book, and abstract its contents, work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right; and, if this may be done except under the clerk's immediate inspection, no record can be safely kept. If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from

in the same state the case referred to was affirmed and the court held that an attorney at law did not have, in his own right or in behalf of a corporation formed for the purpose of carrying on an abstract business, the right against the consent of the custodian of the records and without paying his fees to make copies or abstracts of the records in his office to be used in a private abstract and land title business.[8] Where the common law has not been modified by statute, the person who desires an inspection of public records must show that he has an interest in them and desires to inspect them for a legitimate purpose.[9]

§ 1548. **Inspection allowed by statute.**—But now, generally, the right to inspect public records is conferred upon every citizen by statute. In Florida the statute provides: "Such records shall be always open to the public, under the

minute to minute, from day to day, until his book is finished. He has the right to the services of the public officer for months together without pay; for not only the law, but every principle of propriety, requires that no person shall inspect the books, except under the watchful observation of the clerk."

[8] Land Title Warranty & Safety Deposit Co. v. Tanner, 99 Ga. 470, 27 S. E. 727.

[9] Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 323; People v. Walker, 9 Mich. 328. In Brewer v. Watson, *supra*, where an inspection was sought of the book kept by the auditor of the state for the purpose of entering the accounts of tax collectors with the State, the court said: "It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public, and preserved for public uses and purposes. The right is subject to the same limitations and restrictions, as is the right to an inspection if the books of a corporation, which strangers cannot claim, and which is allowed only to the corporators, when a necessity for it is shown and the purpose does not appear to be improper. 1 Greenl. Ev. § 471; Ang. & Ames, on cor. 681–2. And the individual who claims access to public records and documents (not judicial records), of which, by statute and unvarying usage, the custodian, upon the payment of the fee allowed by law, is bound to furnish copies), can properly be required to show that he has an interest in the document which is sought and that the inspection is for a legitimate purpose."

supervision of the clerk, for the purpose of inspection thereof, and of making extracts therefrom; but the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law." The court said that the authorities were in great conflict, "owing in some measure to the differences in the provisions of the statutes on the subject in the different states," but concluded that the public generally, including those desiring to make a set of abstract books, had a right to inspect and make extracts from the records.[1] Under the

[1] State v. McMillan, 49 Fla. 243, 38 So. 666. The court speaking through Mr. Justice Taylor said: "It will be observed that no limitation is prescribed by this statute as to the extent or duration of the right of access by the public to such records or to the making of extracts therefrom, but, on the contrary, its language is emphatic that "such records shall be always open to the public for the purpose of inspection and making extracts therefrom. Some of the cases relied upon by the respondent hold to the doctrine that no person has any such right of inspection and extracting unless he is personally or prospectively interested in some particular title that he desires to investigate. Our statute imposes no such condition or limitation, but its language in the broadest terms declares that such records shall be always open, not to those members of the public only who may be presently or prospectively interested in some particular matter contained in such records, but 'to the public.' Besides this, even were we to hold that the lounging loiterer on idle curiosity bent could with propriety be excluded from inspection of such records and from taking extracts therefrom, yet this should not warrant the exclusion of the person engaged in the lawful and highly useful enterprise of compiling an abbreviated abstract of the titles to all the different pieces of real estate in a county, aggregating therein in condensed and convenient form all the matter from all of such records that affects each individual parcel of such real estate. Such abstracts are great time and money savers to the public generally, and are at times quite remunerative to the compilers and owners thereof, and in the enterprise of compiling them the compilers become presently and prospectively materially interested in every particle of information disclosed by such records, whether they be presently or prospectively interested in the particular property affected thereby or not.

"It is contended, again, that the respondent clerk has the right to exclude the relators and their assistants from examination of the records, and from making extracts therefrom, unless such relators

statute of Illinois providing that all abstract and other books kept in the recorder's office shall be exhibited to those desirous of inspecting them, and that all persons shall have a right to

shall pay him a large amount as his fees and remuneration for such inspection and extracting. We think that the terms of our statute clearly forbid the assertion of any such claim or demand. The alternative writ of the relators alleges that the relators and their assistants have perfect knowledge of the location in the respondent's office of all of the records sought to be examined by them, and that they can and desire to do all of the work of inspecting and abstracting such records themselves, without any assistance whatsoever from the respondent clerk or his deputies; that they do not need any such assistance from the respondent, and do not ask or desire it. Our statute, already quoted, in express terms provides for just such a case, when it says that 'the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law.' This is tantamount to saying that when he is not required to perform any service in connection with such inspection and extracting, then he is not entitled to any compensation, and nowhere in our statutes is there any fee or compensation fixed or prescribed for the clerk for the bare supervision in his office of parties who may go there themselves to inspect and take extracts from the records without calling upon him for any service or assistance in connection therewith, other than that bare general supervision, observation, or watchfulness his part that it is his duty at all times and under all circumstances to exercise in his office to insure the safe-keeping of such records. Such constant supervision, observation, and watchfulness over the records is one of the prime duties that he assumes when he takes the office, and the law fixes no fee or compensation therefor.

"Our conclusion is that, under the terms and provisions of our statute, the public generally, including any person or firm who may be engaged in the enterprise of compiling a complete set of abstract books of the title to all the real estate in a county, have the continuous right at all reasonable hours and times, by themselves or their agents, to inspect and make extracts from any and all of the public records in the offices of clerks of the circuit courts; and that where such inspection and extracting is done by the parties themselves, or by their agents or assistants, without any service or assistance from the clerk or his deputies in connection therewith, other than that general supervision and watchfulness as to what is going forward in his office that is necessary to the safe-keeping of such records, then such clerk is not entitled to any fees or compensation. Boylan v. Warren, 39 Kan. 301, 18

take abstracts thereof, a private abstract company has the right to make copies of books which contain abstracts of title and which, by statute are required to be made by the recorder, and for copies of which, when made by him, the statute requires him to charge a fee, nothwithstanding the fact that the allowance of this privilege to the abstract company will be to give to it the advantage of the recorder's labor and enable it to compete with him for the business of furnishing abstracts.[2] Similar statutes allowing abstracters to take copies of a part or all of the records exist in other states.[2a] Under the Nevada statute the court held that a corporation organized for the purpose of furnishing abstracts and guaranteeing titles had the right during regular business hours to inspect and make memoranda of the records to the extent to which they related to current transactions, in which it was employed to supply information by persons possessing an interest in the property or attempting to secure an interest in it; but that it did not have the right to copy or inspect all the reco[illegible] enable it to compile an independent set of abstract books and establishing a business to be conducted in opposition to the custodian of the records.[3]

Pac. 174, 7 Am. St. Rep. 551; Bell v. Commonwealth Title Ins. & Trust Co., 189 U. S. 131, 47 L. ed. 741, 23 Sup. Ct. 569; Silver v. People, 45 Ill., 224; State v. Rachac, 37 Minn. 372, 35 N. W. 7; Lum v. McCarty, 39 N. J. Law, 287; In re Chambers (C. C.) 44 Fed. 786; Burton v. Tuite, 78 Mich. 363, 7 L.R.A. 73, 44 N. W. 282; People ex rel. Title Guarantee & Trust Co. v. Reilly, 38 Hun (N. Y.) 429; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. 30; West Jersey Title & Guaranty Co. v. Barber, 49 N. J. Eq. 474, 24 Atl. 381."

[2] Chicago Title & Trust Co. v. Danforth, 236 Ill. 554, 19 L.R.A. (N.S.) 386, 86 N. E. 364. But see before the passage of this statute: Scribner v. Chase, 27 Ill. App. 36.

[2a] See State v. Rachac, 37 Minn. 372, 35 N. W. 7; State v. Long, 37 W. Va. 266, 16 S. E. 578; State v. Elsworth, 61 Neb. 444, 85 N. W. 439; Kalamazoo Gazette Co. v. Kalamazoo County Clerk, 148 Mich. 460, 111 N. W. 1070; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. 30; Newton v. Fisher, 98 N. C. 20, 3 S. E. 822; Bell v. Commonwealth Title Ins. Co., 189 U. S. 131, 47 L. ed. 741, 23 S. Ct. 569; In re Chambers, 4 Fed. 786.

[3] State ex rel. Nevada Title Guaranty & Trust Co. v. Grimes,

§ 1549. **Rights of officer to be observed.**—As the officer must have control of his office and of the records which they contain, he is allowed some discretion as to the manner in which the rights of those desiring to inspect, examine and copy the records may be exercised. He is required to transact the ordinary business of his office, and all persons should be permitted reasonable facilities. It would not be proper for him to allow one person or the representatives of one corporation to occupy his office to the exclusion of all others equally entitled to the same privilege.[4] While a person may have the right under the statute to examine the records, this right does not place upon the officer the annoyance of having a large force in his office or compel him to allow persons to work in his office at unseasonable hours. It does not give any particular person a monopoly of the furniture or office room or records to the exclusion of others. The officer has a right to make reasonable rules and regulations. But if the person has the right to examine the records, the officer must give reasonable privileges for pursuing his inquiries.[5]

§ 1550. **Charge for additional office facilities.**—The officer having charge of the records may prescribe reasonable regulations to be observed by those using his office. The rights of a person desiring to inspect the records "are measured by the law, and cannot be diminished for the benefit of others, nor can they be increased by reason of indulgence to others; and we think that one whose business requires much examination of public records has no greater rights then one whose interests require little. The former cannot, and probably would not, attempt to monopolize the facilities furnished to the exclusion of the latter. But, as already stated, the officer

29 Nev. 50, 5 L.R.A.(N.S.) 545, 84 Pac. 1061.

[4] People v. Richards, 99 N. Y. 620, 1 N. E. 258.

[5] Day v. Button, 96 Mich. 600, 56 N. W. 3.

is under no obligation to provide additional accomodations, or to permit one to move in furniture and occupy permanently any portion of the office." [6] According to these views, the officer may prescribe as a reasonable regulation the payment of a fee to provide additional office facilities.[7] Under a statute authorizing the custodian of records to make reasonable rules as to the examination by abstracters of records in his charge, it was held that a rule permitting the use of the office between the hours of nine and twelve in the forenoon and one and four in the afternoon, except when the officer was attending a session of the court, on which occasion but one hour in the forenoon and one hour in the afternoon was allowed, was a reasonably liberal regulation.[8]

§ 1551. **Objections to abstract.**—A purchaser cannot decline to consummate the sale on account of the insufficiency of the title until he has made a thorough examination of the title, and when he receives an acceptable abstract, showing an apparent defect in the title, he is not justified in refusing to complete the contract if, upon a proper examination, it would appear that the defect had been cured.[9] A seller agreed to furnish a search truly showing the condition of the title to the land to be sold, but furnished in fact a search which purported to be merely an abstract of the records. The purchaser did not object to its form or sufficiency when he received it, and it was held that by his acceptance he treated it as a compliance with the terms of the contract.[1] The attorney for the purchaser is "bound to exercise the reasonable care

[6] Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452.

[7] Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452.

[8] Upton v. Catlin, 17 Colo. 546, 17 L.R.A. 282, 31 Pac. 172. See, also, State v. Rachac, 37 Minn. 372, 35 N. W. 7; Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452.

[9] Moot v. Business Mens' Investment Association, 157 N. Y. 201, 45 L.R.A. 666, 52 N. E. 1.

[1] Moot v. Business Mens' Investment Association, 157 N. Y. 201, 45 L.R.A. 666, 52 N. E. 1.

and diligence of a good and faithful expert in that business, to ascertain the defendant's [vendor's] true title, before the plaintiff was justified in refusing to perform the contract upon the ground of an apparent defect in the title, when no real defect existed. As an intending purchaser, he must be presumed to investigate the title, to examine every deed or instrument forming part of it, especially if recorded, and to have known every fact disclosed, or to which an inquiry suggested by the record would have led." [2] Where a satisfactory abstract is furnished by the vendor in compliance with his contract, but the vendee fails to make the payment at the time specified in the contract, the vendor has the option of considering the contract terminated.[3]

§ 1552. **Pointing out defects.**—The general practice is for the purchaser, after examination of the abstract, to point out the defects which he claims to exist, and thus enable the vendor to correct them.[4] The making of specific requisitions may be treated as the waiver of those not specified.[5] A contract of sale contained the clause: "It is hereby agreed that the vendor shall furnish a complete abstract to the above described property. If the title to said property is not good, and cannot be made good within the said seven days, then the $400.00 herein receipted for shall be returned to the said parties, their heirs and assigns. But if the title is good and said property is not taken within seven days from the date of delivery of abstract, then the $400.00 herein receipted for shall be forfeited to "the vendor" as settled and liquidated damages, and this receipt shall be null and void, and all parties named herein released." The court held that the

[2] Moot v. Business Mens' Investment Association, 157 N. Y. 201, 45 L.R.A. 666, 52 N. E. 1.

[3] Paget v. Park, 50 Minn. 186, 52 N. W. 532.

[4] Lessenich v. Sellers, 119 Iowa, 314, 93 N. W. 348; Warvelle, Abstracts, 4; 1 Am. & Eng. Enc. Law, 215.

[5] Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340; Papin v. Goodrich, 103 Ill. 86.

running of the seven days began from the time of the delivery of an abstract certified to date and not from the date of the delivery of an incomplete abstract.[6] In an action to reform, as against the vendee, a contract for the conveyance of real estate and for specific performance of the contract as reformed, it cannot be urged in argument on appeal, as an objection to granting the relief sought, that the title as shown by the abstract tendered by the vendor is not perfect, when the vendee did not insist upon the defect referred to as a reason for refusing the deed, and when the vendor offered to cure the defect and would have been able to have remedied the defect, as appeared by the evidence in the trial court, if the opportunity to do so had been given to him.[7]

§ 1553. **Holding abstract as security.**—If the owner of the land delivers an abstract of title to the attorney for the mortgagee, the abstract may be treated as a part of the security for the loan. Until payment of the mortgage the mortgagor is not entitled to the possession of the abstract.[8] For the purpose of diminishing the expenses of searching, the owner of property, who was about to execute a mortgage on it, delivered to the attorney for the mortgagee an abstract of the title. An action was brought to recover the possession of the abstract. In the lower court the defendant offered evidence tending to show that it was the custom among conveyancers to retain abstracts under similar circumstances, but the court directed a verdict for the plaintiff. On appeal, however, the court held that, upon the making of the loan, the abstract became a part of the security, and that in case of a sale of the mortgage or of a foreclosure it was necessary for the mortgagee to possess it or to secure another.[9]

[6] Davis v. Fant, (Tex.), 93 S. W. 193.

[7] Wold v. Newgard, (Iowa), 94 N. W. 859.

[8] Equitable Trust Co. v. Burley, 110 Ill. App. 538.

[9] Holm v. Wust, 11 Abb. Pr. N. S. 113.

§ 1554. **Sale of abstract books.**—Aside from the question of how complete an abstract should be to comply with the vendor's agreement to furnish an abstract, the question may also arise in the sale of books claimed to contain complete abstracts of the records of a county. The owners of certain abstract books, were desirous of forming a corporation to purchase them and to conduct an abstract business. A person who was entirely unacquainted with the business was induced to become a purchaser of stock in the corporation, on the representation made by the owners of the books that they had a certain value and contained a complete abstract of title to all the real estate in the county. These books were an index to the books of the recorder of deeds for the county, showed the various conveyances and the books and pages where they might be found, but they did not contain an abridgment of the contents of these conveyances nor of the certificates of acknowledgments attached to them, or the manner of their execution or their dates. The purchaser of the stock in the corporation commenced an action for deceit, alleging that the books were not of the value which they were represented to be, and did not contain complete abstracts of title, but constituted, at the most, only an index to the recorder's books. The court held that, under these facts, the purchaser was entitled to have the case submitted to the jury.[1]

[1] Hess v. Draffen, 99 Mo. App. 580, 74 S. W. 440. Said the court: "At best, they were only partial abstracts—most certainly not complete. As the defendants had used them, they must have known what they were, and it therefor must necessarily follow that defendants knew that the said representations were untrue and the evidence tended to show that they did not cost the sum of $6,000, but much less. It is true that representations in regard to the value of property are held mere matters of opnion, which do not imply knowledge: Cornwall v. McFarland, 150 Mo. 377, 51 S. W. 736; Brownlow v. Wollard, 61 Mo. App. 124. But 'in the promotion of business enterprises there is a mutual trust between the parties, and a false representation as to the actual cost of material going into such joint enterprise constitutes a breach of faith and is actionable': Garrett v. Wannfried, 69 Mo. App. 437."

§ 1555. Taxation of abstract books.—There is a marked difference of opinion to the question of the liability of abstract books to taxation. It is said that they should not be taxed because they have no intrinsic value, being like private manuscripts. In Michigan, the constitution contains a provision requiring assessments to be made on property at its cash value and the court declared that this provision means "not only what may be put to valuable uses, but what has a recognizable pecuniary value inherent in itself, and not enhanced or diminished according to the person who owns or uses it." Speaking of abstract books the court said: "They are only valuable for the information they contain, and that information is conveyed by consultation or extracts. Their value is only kept up by their completeness and continued correction. The sale of a complete copy would practically destroy the value of the books in the hands of the plaintiff. So a similar compilation by any one else would have a like result. The value of the books, except as used, is nothing. They resemble in nature, if not precisely, the books which are consulted by any person who makes an income from his acquired knowledge, whether scientific or otherwise; as a surveyor's notes, an author's memoranda, and many analogous things. They may be, and are, very serviceable, but they are not things that the law has made subject to seizure or assessment."[2] Although these books may be made subject to exe-

[2] Perry v. City of Big Rapids, 67 Mich. 146, 34 N. W. 530, 11 Am. St. Rep. 570. The court placed its decision upon the authority of Dart v. Woodhouse, 40 Mich. 399, 29 Am. Rep. 545 in which an execution had been levied on a set of abstract books and in which the court said: "The right of the proprietor of such a manuscript to publish it or to keep it back from publication is not only a property right, but one which is purely incorporeal and attended with considerations of a nature entirely different from any involved in other rights. The law will not permit it to be interfered with except as he chooses to make it public, and the right is one which is entirely independent of locality and belongs essentially to the owner wherever he may be, and in whatever locality one or more copies of

cution by statute, it is held that such a statute will not operate as modifying the rule by which they are considered not to be liable to taxation.[3]

§ 1556. **Better view, subject to taxation.**—But the better view is that these books are property of a certain value and may be property assessed for taxation. They are used as a means of profit and have a market value.[4] Mr. Justice Granger, of Iowa, in discussing this question said that books of this character were not made for publication, in the general sense. "Such a publication" said he, "would defeat the very purpose of their production. Their value consists, chiefly, in their contents being kept from the public. They are the means, in a sense the instruments, for carrying on a busi-

the writings may be found. The value when it is considered at all in a pecuniary sense depends on the information or interest of the composition or document, and not on the particular bundle of paper which records it.

It is very well settled by the decisions of the United States Supreme Court, that even after a work is published no creditor can reach the copyright unless some special provision of law is made on the subject, and it is also settled that the author's rights are never subject to disturbance except in accordance with statute. No law can compel a man to publish what he does not choose to publish. See Freeman on Executions, § 110; Stevens v. Gladding, 17 How. 451, 15 L. ed. 156; Stephens v. Cady, 14 How. 531, 14 L. ed. 529; Prince Albert v. Strange, 1 Mac. & G. 25; Banker v. Caldwell, 3 Minn. 94.

It would be very absurd to hold that books could be seized and sold on execution which after sale the purchaser could not use."

[3] Looms v. City of Jackson, 130 Mich. 594, 90 N. W. 328. The court said it would be presumed that the legislature was aware of the decisions holding such books not to be subject to taxation, and observed: "They chose to enact a law making such property subject to levy and sale upon execution, but have not yet chosen to make them subject to taxation. Making it subject to levy upon execution does not render it subject to taxation; so making it subject to taxation would not render it subject to sale upon execution."

[4] Leon L. & A. Co. v. Equalization Board, 86 Iowa, 127, 17 L.R.A. 199, 41 Am. St. Rep. 486, 53 N. W. 94; Booth etc. v. Phelps, 8 Wash. 549, 23 L.R.A. 864, 36 Pac. 489, 40 Am. St. Rep. 921.

ness; as much so as are the tools or machinery by which the artisan plies his calling." He declared that it would be a strange perversion of the law to hold that such books, which are transferable from hand to hand and have a fixed value, and are "usable by any person of ordinary intelligence and ability as a means of profit, should be exempt from taxation merely because their contents are written, and not printed, when, in either case, their use would be the same." [5] The fact that the books are largely in abbreviations and in a cipher code which five persons only understand does not render them exempt from taxation. They are still personal property having a value.[6]

§ 1557. **Confidential relations of abstract maker.**—The relation that an abstract maker occupies to the person who employs him is one of confidence, and is similar, even if less sacred, to the relation borne by a lawyer to his client. "Such persons consult the evidence of ownership and become familiar with the chains and histories of title. They handle private title papers, and become aware of whatever weaknesses or defects may exist in the legal proceedings through which the ownership of real property is secured. They should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them. Any abuse of such trust and confidence should be met with emphatic rebuke." [7] If a county surveyor and abstract maker is employed to examine the title to land, for the purpose of curing defects in the title and also for the purpose of procuring for his employer the title to land lying contiguous, he cannot acquire the title to such land for himself. He sustains a con-

[5] Leon L. & A. Co. v. Equalization Boad, 86 Iowa, 127, 17 L.R.A. 199, 53 N. W. 94, 41 Am. St. Rep. 486. See, also, Warvelle, Abstracts, § 12.

[6] Booth v. Phelps, 8 Wash. 549, 23 L.R.A. 864, 36 Pac. 489, 40 Am. St. Rep. 921.

[7] Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502.

fidential relation to his employer and the title secured by him will be treated as held in trust for his employer.[8]

§ 1558. Recovery of expenses for vendor's default.—In California, the civil code allows as damages for breach of an agreement to convey an estate in real property "the price paid and the expenses properly incurred in examining the title and preparing the necessary papers with interest thereon."[9] Where a contract of sale allowed a specified time for the examination of the title and provided for the return of the deposit made under the agreement, if the title should prove to be defective, a recovery of the deposit may be obtained if it appears that a part of the lot had been dedicated and used as a public street. The vendee is also entitled to recover as damages all expenses which he has properly incurred for the examination of the title and for the preparation of the papers necessary to consummate the sale.[1] The purchaser is entitled to recover as damages the percentage on the purchase price which he has paid at the time of the purchase.[2] He is also entitled to recover the fees of the auctioneer, if he has paid them, as well as the expenses paid for the examination of the title.[3]

§ 1559. Damages for failure of title.—If an owner of land agrees to sell it, believing that he has a good title, and that it is free from incumbrances, and he fails to fulfill the contract because the title is defective, or fails on account of the discovery of an incumbrance, previously unknown to him, preventing the performance of the contract, he is liable only in nominal damages for his breach of contract.[4] But this

[8] Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502.

[9] Civil Code § 3306.

[1] Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546.

[2] Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303.

[3] Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303.

[4] Cockroft v. N. Y. & H. R. R.

rule does not apply where the seller knows of the existence of the defect or of a want of authority to convey, or is guilty of acts showing misconduct, fraud or bad faith in making the contract of sale, for the purpose of securing a large sum for the sale or an undue advantage which he has no right to take.[5] If the former owners of land in a block had agreed that no building should be placed upon a stipulated number of feet of the front of the lots, but that this space should be forever maintained open for courtyards, the title is not free from liens and incumbrances. A purchaser is not required where such an incumbrance exists to complete his purchase, under a contract by which the seller agreed to sell and convey the lot free and clear of all incumbrances.[6] A purchaser is not required to accept a title covered with a mortgage although the seller may offer to convey with covenants of warranty and to give ample indemnity against the mortgage.[7]

§ 1560. **Liability of searcher for negligence.**—A searcher of titles must use reasonable care in his task and is

Co., 69 N. Y. 201; Pumpelly v. Phelps, 40 N. Y. 59, 24 Barb. 100, 43 Barb. 469; Conger v. Weaver, 20 N. Y. 144; Leggett v. Mutual Life Ins. Co., 53 N. Y. 394; Peters v. McKeon, 4 Denio, 546; Baldwin v. Munn, 2 Wend. 399; Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303; Bigler v. Morgan, 77 N. Y. 320.

[5] Pumpelly v. Phelps, 40 N. Y. 59; Margraf v. Muir, 57 N. Y. 159.

[6] Wetmore v. Bruce, 118 N. Y. 319, 23 N. E. 303.

[7] Cockroft v. N. Y. H. & R. R. Co., 69 N. Y. 201. In this case the seller had laid out a tract of land into lots and had sold them at auction and had agreed, as part of the terms of sale to convey the lots sold by warranty deeds free from incumbrances. At the time of the sale, two large mortgages which covered the railroad property, also covered a portion of the tract, but the officers of the company acted in the utmost good faith, and the evidence tended to prove that they were totally unaware of the fact that the mortgage covered the lot sold. The company was unable to secure a release of the mortgages. The purchaser was allowed to recover the deposit made by him at the time of the sale and the attorneys fees for examining the title. See, also, Hewison v. Hoffman, 4 N. Y. S. 621; Uhl v. Loughran, 2 N. Y. S. 190.

responsible in damages for a loss occasioned by his negligence. There is an implied contract on his part to exercise reasonable care and skill in the performance of his undertaking. If he fails to exercise this reasonable care and skill, he is, like anyone else occupying a similar relation, liable for the injury that is the direct result of his neglect or want of skill.[8] "It is elementary" said Mr. Justice Sherwin, "that one who undertakes, for a consideration, the examination of titles is liable for a failure to exercise ordinary care in so doing. It is the general rule that the liability of an abstracter is based upon contract."[9] If a person informs an abstracter that he shall rely entirely upon his abstract and is assured that he may place such reliance on him, the abstracter, if he fails through negligence to set out in the abstract an existing *lis pendens*, will be liable for such damages as may result from his negligence.[1] He is liable if he fails to specify an incumbrance against the property.[2]

[8] National Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Economy Building etc. Assn. v. West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854; Byrnes v. Palmer, 18 N. Y. App. Div. 1, 45 N. Y. S. 479; Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 79, 72 Am. St. Rep. 308; Humboldt Building Assn. v. Ducker, 82 S. W. 569; Young v. Lohr, 118 Iowa, 624, 92 N. W. 684; Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435; Dodd v. Williams, 3 Mo. App. 278; Rankin v. Schaeffer, 4 Mo. App. 108; Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641; Hirshiser v. Ward, (Nev.), 87 Pac. 171; Security Abstract Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073; Watson v. Muirhead, 57 Pa. St. 161, 98 Am. Dec. 213; Puckett v. Waco Abstract Co., 16 Tex. Civ. App. 329, 40 S. W. 812; American Trust Investment Co. v. Nashville Abstract Co., (Tenn.), 39 S. W. 877; Equitable Building etc. Assn. v. Bank of Commerce etc. Co., 118 Tenn. 678, 12 L.R.A.(N.S.) 449, 102 S. W. 901; Stephenson v. Cone, (S. D.), 26 L.R.A.(N.S.) 1207, 124 N. W. 439.

[9] In Young v. Lohr, 118 Iowa, 624, 92 N. W. 684. See, also, Russell v. Polk Co. Abstract Co., 87 Iowa, 233, 54 N. W. 212, 43 Am. St. Rep. 381.

[1] Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308.

[2] Security etc. Co. v. Longacre, 56 Neb. 469.

§ 1561. **Failure to show liens or set out documents correctly.**—If the abstract does not note that there has been a judgment and a sale for taxes, and the purchaser is ignorant of this fact until the expiration of the time for redemption, and as a consequence is compelled to pay the necessary erpenses for the removal of the cloud from his title, the abstracter is liable in damages for the amount so paid.[3] But before damages can be recovered it must appear that they are the direct result of his negligence.[4] If the abstract refers to a will and purports to set out its contents as devising the property in fee, while in fact the will devised only a life estate, the abstracter has not exercised a proper degree of care and skill. If the person who ordered the abstract from him is injured through his reliance on the abstract, he may recover damages to compensate him for his loss.[5] If an attorney is employed to examine the title to land with a view of lending money to the owner and taking a mortgage on the land as security, and if the attorney knows that a building is in course of erection on the land, it becomes his duty to ascertain whether any liens exist for the supply of labor or materials. If he fails to ascertain this fact

[3] Chase v. Heney, 70 Ill. 268.

[4] Kimball v. Connolly, 33 How. Pr. 247.

[5] Equitable Building etc. Assn. v. Bank of Commerce & T. Co., 118 Tenn. 678, 12 L.R.A.(N.S.) 449, 102 S. W. 901. "An abstracter" said the court "may content himself with presenting a mere index to the records, and if such a paper be accepted by his customer the latter cannot complain. Such a paper could be delivered and accepted only under a mutual expectation that the customer would examine the records referred to for himself. But where the abstract purports to state the contents or substance of a deed, will, or other instrument, and there is nothing upon the face of the abstract to indicate a mistake or error, the customer is justified in relying upon it, without making an original investigation, and is not guilty of negligence in so doing. If there is in fact an error in the abstract, and through reliance upon it the customer has sustained injury he may hold the abstracter liable therefor to the extent of the injury sustained, provided the error complained of is such as could have been avoided by the exercise of ordinary care and skill on the part of one possessing qualifications adopted to the business of abstracting."

and damage is caused to the mortgagee by the attorney's negligence, the latter is guilty of a breach of his contract of employment.[6] A failure to show a judgment against property constitutes negligence.[7] An abstracter who guarantees "the above to be a true abstract of the records, so far as they relate to the premises described at the head of this brief, from the date of the first conveyance or decree of court shown herein," does not guaranty measurements.[8] It is not necessary in an action against an abstracter to show that the remedy against the grantor has been exhausted or that he is insolvent. A complaint which alleges that the abstracter agreed to furnish a full and complete abstract is sufficient. It is not necessary to allege that the abstract was to commence from any particular date.[9] If the searchers guaranty an abstract to be a true and perfect abstract of the title, they are liable in damages if they omit deeds, showing that a part of the land has been conveyed, and the purchaser relies upon the abstract. To furnish abstracts is a business and those who engage in it assume the obligation of performing their duties in a careful manner.[1] While as a general proposition an abstracter is not required to go outside of the record in a search for facts affecting the title, yet he is required to furnish by means of the abstract everything relating to the names and to the property in question that might reasonably affect the title, so far as the same appears from the record.[2]

[6] Humboldt Bldg. Ass'n v. Ducker, (Ky.), 82 S. W. 968.

[7] Renkert v. Title Guaranty Co., 102 Mo. App. 267, 76 S. W. 641.

[8] American Trust Investment Co. v. Nashville Abstract Co., (Tenn.), 39 S. W. 877.

[9] Hirshiser v. Ward, 29 Nev. 228, 87 Pac. 171.

[1] Dickle v. Nashville Abstract Co., 89 Tenn. 433, 14 S. W. 896.

[2] Stephenson v. Cone, (S. D.), 26 L.R.A.(N.S.) 1207, 124 N. W. 439. If a searcher fails to note judgments against "Ed. J." or "E. J." Borstad he is liable to a purchaser from Edward J. Borstad for any injury that may result. Stephenson v. Cone, (S. D.), 26 L.R.A.(N.E.) 1207, 124 N. W. 439.

§ 1562. Limitation of liability as to records examined. —An abstracter may limit his liability by a certificate that he has examined the records in certain offices only. Thus, an abstracter stated in his certificate that he had carefully examined the records of the office of the county clerk, the clerk of the district court, and county treasurer, and that there were no liens of record upon the property described except as mentioned in the abstract. There was in fact a prior mortgage upon the property in the office of the register of deeds. A person purchased a mortgage, which thus appeared as a first lien, but in a suit upon the bond of the abstracter to recover for the loss occasioned by the omission from the abstract of the prior mortgage, the court held that on account of the limitation contained in the certificate there could be no recovery.[3] The court said that an abstracter "may be, and frequently is, employed to search the record for liens only, or for deeds only, but in all cases his liability is measured by his employment. And when, as in this case, his engagement applies to particular records, his liability will not, by implication, be so extended as to embrace liens or conveyances not disclosed by a search of the designated office or offices. In other words, in order to maintain an action upon the statutory undertaking of a abstracter, it is necessary to show that the act of omission or commission alleged as the cause thereof is a breach of the conditions, express or implied, of the particular engagement to which it relates."[4] If, in the examination of a tax deed, an abstracter sees that by the record jurisdiction is shown in the court to render a judgment that is the foundation of the deed and that there was complete identity in name and description between the parties to the judgment and the title claimed under it, he is not negligent, in an actionable sense, for a failure to make inquiries *dehors* the record to ascertain if there may not be a possible defect in the proceedings in

[3] Thomas v. Carson, 46 Neb. 765, 65 N. W. 839.

[4] Thomas v. Carson, 46 Neb. 765, 65 N. W. 839.

the names or description of the parties.[5] An abstracter cannot place a limitation on his liability, however, by an obscure clause in his certificate, unless he calls the attention to it of the person employing him.[6] But if the agreement is to make a correct abstract of title from a specified sale, the abstracter is not obliged to note upon the abstract an unsatisfied judgment against a grantee in the chain of title, which only appears of record priior to that date, notwithstanding that the judgment becomes a lien upon the property after that time.[7]

§1563. **Knowledge of legal effect of conveyances.**—While skill and care are required of an abstracter, and he is liable for a failure to exercise either, in case damages have been caused by his negligence, he is not a guarantor, and his liability depends solely upon a failure to exercise reasonable care and skill.[8] In a case in Missouri the court said that an attorney is not liable to his client for a mere error of judgment. "Especially he is not liable if he mistakes the law in a matter of difficulty where the law is not well settled. But where one who proposes to make a specialty of examining titles, in the course of his business, having been paid for his services, gives a certificate that he has made examination and finds no incumbrances against certain property, he will be liable, if the in-

[5] Keuthan v. St. Louis Trust Co., 101 Mo. App. 14, 73 S. W. 334. The court referred to Warvelle on Abstracts, p. 619 as to the duty of an abstracter and said: "Where a conveyance of real property results from legal proceedings, and the official deed is only prima facie evidence of the recitals therein, as in a tax deed in this State, an examiner of titles should do one of two things. He should either by marginal notes on his abstract call attention to the fact that the deed is but prima facie evidence of title, or he should examine the court proceedings, and ascertain for himself whether or not the court rendering the judgment had jurisdiction of the subject matter and had also acquired jurisdiction of the person of the defendant, and that the parties to the suit and to the title are identical."

[6] Chase v. Heaney, 170 Ill. 270.

[7] Wakefield v. Chowan, 26 Minn. 379, 4 N. W. 618.

[8] Schade v. Gehner, 133 Mo. 252, 34 S. W. 576.

cumbrance is of record, in such a way as to give constructive notice to every one interested and actual notice to every one looking for it in the proper way. What is a lien upon real estate may be a different question in some cases to decide; but an examiner of titles to real estate is bound to know the state of the law on the subject, at least sufficiently to put him on his guard; and where there may be reasonable doubt as to whether such or such a recorded instrument is a lien, if he choose to resolve the doubt he does so as his own peril. But, on the other hand, the abstracter can protect himself by his certificate. If he does not choose to assume this liability, he may, in the language of the court, "easily avoid it by noting in his certificate every question which arises upon the title as to which there can be the slightest doubt in the legal mind, or by giving a list of deed and incumbrances, and abstaining from expressing any opinion as to their legal effect." [9] But if the abstracter undertakes to furnish to an intending purchaser an abstract or a statement of the conveyances and incumbrances affecting a tract of land and makes an incorrect report of the quantity of land that had been conveyed by prior conveyances, he is liable in damages to the purchaser who has relied upon the information furnished.[1] If a register of deeds undertakes to supply a purchaser with a full abstract of the title to land, and carelessly omits to mention an incumbrance, the register is liable to the purchaser for any additional expense the latter has borne to perfect his title.[2]

[9] Dodd v. Williams, 3 Mo. App. 278. See, also, Dundee Mortgage & Trust Investment Co. v. Hughes, 20 Fed. 39; Keuthan v. St. Louis Trust Co., 101 Mo. App. 1, 73 S. W. 334.

[1] Clark v. Marshall, 34 Mo. 429. In this case the defendants denied in their answer that they were called on for the statement of the number of feet unsold, but stated that they were called on solely for an abstract of encumbrances to the date of the abstract. The court instructed the jury that if they were not employed by the plaintiffs to ascertain and report among other things the quantity of ground, they were not liable, but that if they were so employed and incorrectly stated the quantity by which the plaintiffs were misled, they were liable.

[2] Smith v. Holmes, 54 Mich. 104, 19 N. W. 767.

§ 1564. **Liability to employer only.**—As the relation which exists between an abstracter and the person employing him is one of contract, it will follow that for any negligence constituting a breach of that contract the abstracter is liable only to the other party to the contract and not to a third person. Therefore, the only persons who can recover damages, except in the few cases which we shall later notice, are those for whom the abstract is made.[3] In accordance with this rule, if the owner of a tract of land employs a searcher of records to make an abstract to enable him to procure a loan on the property and the owner secures a loan based on the title as shown by the abstract, and if the mortgagee afterwards sells the note secured by the mortgage and procures a continuation of the abstract to show the making of the loan as well as the mortgage securing it, the searcher will not be liable to the purchaser of the note for any loss that he may suffer arising through the incorrect condition of the abstract.[4] Because there was no priority of contract, the searcher in such a case is not liable to the purchaser of the note, in the absence of an allegation that the mortgagee was acting as the purchaser's agent in securing the abstract.[5] And it is held that the rule that the liability of an examiner of titles for want of care is to the party alone who employed him, applies even where the examiner knows that his certificate as to title is to be used in a sale or loan to advise the purchaser or

[3] National Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Dundee Mortgage Co. v. Hughes, 20 Fed. 39; Mallory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 140; Symns v. Cutter, 9 Kan. App. 210, 59 Pac. 671; Allen v. Hopkins, 62 Kan. 175, 61 Pa. 750; Deckle v. Nashville Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616; Equitable Building etc. Assn. v. Bank of Commerce, 118 Tenn. 678, 12 L.R.A.(N.S.) 449, 102 S. W. 901; Talpey v. Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206; Zweigardt v. Birdseye, 57 Mo. App. 462; Houseman v. Association, 81 Pa. St. 262; Peabody etc. Loan Assn. v. Houseman, 89 Pa. St. 261, 33 Am. Rep. 757.

[4] Talkey v. Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206.

[5] Talpey v. Wright, *supra*.

lender.[6] But if by statute an abstracter is required to give a bond conditioned for the payment of any damages that may be caused to any party, through any error or deficiency in any abstract issued by him, he is liable for an error to a purchaser relying on the abstract regardless of the question for whom the abstract was ordered or who paid for it.[7]

§ 1565. **Searcher knowing abstract is to be used by purchaser.**—While the rule is general that when there is no privity of contract there can be no recovery of damages for negligence, still there are some cases, which are not so much in conflict with this rule, as they are exceptions to it, or rather they involve another principle—that is, reliance placed upon the searchers act as an inducement to part with value. For example, a building and loan association was induced to make a loan under these circumstances: An owner of land, who was a conveyancer, applied to the association for a loan and offered as security mortgages on the property, and on his statement to the attorney for the association that he could obtain the searches more quickly from the recorder of deeds, he was allowed to do so. The owner induced the clerk of the recorder to omit a mortgage, assuring him that the mortgage would be satisfied. The association made the loan based upon the title as shown by the search. The property was sold under the omitted mortgage and, as a consequence, the associa-

[6] Zweigardt v. Birdseye, 57 Mo. App. 462. It is said in Warvelle on Abstracts p. 8, "To fix the liability of the examiner there must be privity of contract with the injured party, for he can be held answerable for his errors only to the person who employs him; and where, in the absence of fraud, collusion or falsehood, the examiner has made an erroneous certificate, upon the strength of which a third person has loaned and lost money, no liability will attach, notwithstanding the fact that the money was advanced on the assurances of the abstract, and to the person who had caused the same to be made." See, also Martindale, Abstract of Title, § 185.

[7] Goldberg v. Sisseton Loan & Title Co., (S. D.), 123 N. W. 266.

tion lost the money which it had advanced on mortgage. It was held that the recorder was liable for the loss.[8] In a case decided in Tennessee it appeared that the purchasers declined to purchase a tract of land until they were furnished with an abstract of title. The owner thereupon applied to an abstract company for an abstract and the company supplied it to the owner guaranteeing it to be a true and perfect abstract of title. The purchaser consummated the purchase on the faith of the abstract, but two conveyances embracing about four acres of land were omitted. The abstract company prepared the deed from the owner to the purchasers. The court held on a demurrer to the bill that the abstract company was liable, saying: "It is clear from the bill that complainants relied upon the abstract and the guaranty of its correctness and would not purchase without it. The abstract company held itself out as competent to do the work, and it is well understood that purchasers rely upon the work of such corporations as security for the perfectness of title and expect them to point out any defects. Such was the case here. Complainants declined to purchase except upon an abstract."[9] Although abstracts are supplied to a corporation to be paid for by its borrowers, the abstracter will be liable to the corporation for his omission to disclose an unsatisfied judgment, when he knows that the abstract is made for the exclusive use and

[8] Peabody Building etc. Assn. v. Houseman, 89 Pa. St. 261, 33 Am. Rep. 757.

[9] Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616. In that case the point was urged that there was no privity of contract. The court did not pass on the point directly. In this case there was the element of the abstract company participating in the transaction in drawing the deeds, and assuming to act jointly as the agent of both vendor and purchaser. See for other cases in which an abstracter has been held liable to a third person: Western Loan Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435; Economy Building & Loan Assn. v. West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854; Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308.

benefit of the corporation which will rely on it in making the loan.[1]

§ 1566. **Custom for subsequent parties to rely upon abstract.**—In a recent case in Ohio the court announced the general rule that an action against an abstract or to recover damages for negligence in making an abstract or certifying to it must sound in contract, and that the abstracter can be held liable only to the person who employed him.[2] It said that, "even in the exceptional cases in which courts have sought to mitigate the rigor of the rule, that object has been accomplished by straining the doctrine of privity of contract."[3] But in that case reliance was not placed upon the contract of the abstracter, but it was claimed that the right to recover damages against the abstracter for negligence existed independently of contract. It was alleged that it was the custom for all parties dealing subsequently with the property to rely and act upon the accuracy of the abstract. It was contended that the abstracter knew this custom and that, consequently, a legal duty was imposed upon him to make the abstract accurate, and that the certificate by the abstracter to his employer would inure to the benefit of all subsequent grantees by "a natural continuous sequence, uninterruptedly connecting the breach with the damage as cause and effect." But the court

[1] Western Loan & Savings Co. v. Silver Bow Abstract Co., 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435.

[2] Thomas v. Guarantee Title & Trust Co., 81 Ohio St. 432, 26 L.R.A.(N.S.) 1210, 91 N. E. 183, citing Savings Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Equitable B. & L. Assn. v. Bank, 118 Tenn. 678, 12 L.R.A.(N.S.) 449, 102 N. W. 901; Mallory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 140; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Talpey v. Wright, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206.

[3] Thomas v. Guarantee Title & Trust Co., *supra*. The court said that the following were typical cases of that kind: Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308; Denton v. Nashville Title Co., 112 Tenn. 320, 79 S. W. 799; Economy B. & L. Assn. v. West Jersey Title Co., 64 N. J. L. 27, 44 Atl. 854.

did not agree with this contention saying that "it is elementary law that usage or custom cannot create a contract or liability where none otherwise exists. A usage or custom can only be used to explain or aid in the interpretation of a contract or liability already existing independently of it. It cannot be permitted to contradict or vary the express terms of a contract; nor can it vary the import of a contract." The court further declared that, in the absence of fraud or such mistake as a court of equity would recognize, it would be necessary, in order to uphold the theory advanced, to ignore the doctrine of *caveat emptor,* "which requires a vendee to protect himself by investigation and express covenants." Speaking of the transaction which formed the basis of the action, the court stated that it contained no element of deceit or fraud, but "it was a mere private contract of employment for services upon a subject-matter about which the public were not, and could not be concerned. In the nature of the transaction it could not be fairly implied that the public or any considerable part of the public would be concerned with the subject-matter of the transaction; or that the manner in which it must be conducted would depend on a custom which is contrary to law, and which would relieve a purchaser from the obligation to investigate for himself the title to property which he purchases." [4]

§ 1567. **Owner of property acting as agent for lender.** —The owner of the property may apply to the abstracter as the agent of a person to whom an application has been made for a loan, and in such case the abstracter will be liable to the principal for any loss caused by his negligence. It is not necessary that the agency should be disclosed to make the abstracter liable, nor is it essential that it should have appeared from the nature of the transaction. The question is one of

[4] Thomas v. Guarantee Title & Trust Co., 81 Ohio St. 432, 26 L.R.A.(N.S.) 1210, 91 N. E. 183.

fact. If in fact the owner was the agent of the lender and that fact is established by evidence, the lender is the person who actually has contracted through his agent with the searcher. Their rights are reciprocal, the lender being liable for the services in furnishing the abstract and the searcher for his negligence.[5]

§ 1568. Actual damages sustained.—Before a party can recover damages for any loss sustained by a faulty abstract, he must show that he relied upon the abstract.[6] If the abstract purports to give the substance of a conveyance and contains nothing which upon its face indicates an error or mistake, the customer is not guilty of negligence, if he relies upon the abstract and fails to make an original investigation. If he relies upon the abstract and has sustained an injury thereby, he can hold the abstracter responsible, if the error is one that a person of ordinary care and skill in that business would not make.[7] A recovery in damages cannot be had

[5] Young v. Lohr, 118 Iowa, 624, 92 N. W. 684. In this case the judgment was rendered against the owner and his land was sold under the judgment. After the sale of the land he applied to a firm for a loan and made them his agents for procuring it, paying off a mortgage on the land and all other liens and incumbrances on the land, and he agreed to furnish a complete abstract of title to the land. He did deliver to the firm an abstract which was not brought down to date and they sent it to the abstracter for extension and certification. The court conceded that: "It is the general rule that the liability of an abstracter of titles is based upon contract." It referred to the case of Bank v. Ward, 100 U. S. 195, 25 L. ed. 621, and said that the facts in that case were not parallel to those in the case before the court, because it was not shown in the case of Bank v. Ward that the owner who applied for the abstract was acting as the agent of the plaintiffs.

[6] Young v. Lohr, 118 Iowa, 624, 92 N. W. 684. Equitable Bldg. & L. Assn. v. Bank of Commerce, 118 Tenn. 678, 12 L.R.A.(N.S.) 449, 102 S. W. 901; U. S. Wind Engine Co. v. Linville, 43 Kan. 455, 23 Pac. 597; Hirshiser v. Ward, (Nev.), 87 Pac. 171.

[7] Equitable Bldg & L. Assn. v. Bank of Commerce, 118 Tenn. 678, 12 L.R.A.(N.S.) 449, 102 S. W. 901, and cases cited.

unless it can be shown that actual injury has resulted to the person who relied, and who had a right to rely, on the abstract. The mere fact that an error in the abstract exists is not sufficient, but it must be shown, in addition to this fact, that actual loss resulted from it.[8] If no property is bought and nothing is parted with, there can be no damages.[9] A purchaser of a

[8] Puckett v. Waco Abstract & Investment Co., 16 Tex. Civ. App. 329, 40 S. W. 812; Williams v. Hanley, 16 Ind. App. 464, 45 N. E. 622; Batty v. Fount, 54 Ind. 482; W. S. Wind Engine Co. v. Linville, 43 Kan. 455, 23 Pac. 597; Byrnes v. Palmer, 18 N. Y. App. Div. 1, 45 N. Y. S. 479; Kimball v. Connolly, 3 Keyes N. Y. 57.

[9] Kimball v. Connolly, 3 Keyes (N. Y.) 57. A husband's lands were sold upon execution and his wife, desiring to redeem from the sale, engaged a searcher to make an abstract. It became necessary for the wife to borrow the money necessary to make the redemption and it was her purpose to secure a loan upon the lands sold at the execution and upon other property. The abstract furnished incorrectly stated the day of the execution sale, and showed that about ten days longer time existed for the redemption than was shown by the record. She did not discover the mistake, she claimed, until the day before the time in which the redemption could be effected, and being unable to make the loan in time, she failed to make the redemption. She alleged negligence and a fraudulent purpose on the part of the abstracter to defeat the redemption. Her husband, Jesse Roberts, acted as her agent in the transaction of the business. In a suit brought by the wife the court instructed the jury: "If you find from the evidence that the mistake was made honestly, that it was not made in bad faith, with any intent to mislead the plaintiff, and that defendants were ignorant in fact that the mistake had been made; and you further find that plaintiff or her agent, Jesse Roberts, discovered the mistake, and ascertained when the time of redemption would expire under the sale by execution in favor of Utley [the judgment creditor] before it had expired, and that by the exercise of ordinary diligence he could have informed defendants, or either of them, of such mistake, then it was his duty to have communicated such fact to the defendants, that they might have an opportunity to protect themselves, and if he failed to do so, you should find for the defendants." On appeal the court said: "This instruction is doubtless correct. Good faith and fair dealing required the plaintiff, upon discovering the mistake, to give information thereof to the defendants, to the end that they could have taken action for their own protection, in averting the consequences likely to follow." But the court said also "that without considering the soundness of the instruction,

tax title cannot recover damages from an abstract company because it failed to show on the abstract supplied by it a judgment from which an appeal was pending, where no injury was caused by the judgment, the lien of which afterward expired by limitation, and where the loss of the purchaser arose from the fact that his tax title was void and was overcome by the foreclosure of an unrecorded mortgage on the land.[1] "The damages in this class of cases" said Mr. Justice Neil, "should be confined to injuries which the court can see resulted in loss of title or impairment of some kind to the ownership or enjoyment of the property which was purchased on faith of the abstract, and that such injury was the direct result of the defect complained of therein."[2] If an abstracter contracts to make a search and delivers one in performance of his contract, it makes no difference who certifies to the search. The abstracter is liable for negligence.[3] In some cases a party may be entitled to nominal damages.[4] In a suit for damages based upon negligence in the abstracter the statute of limitations commences to run from the time at which the abstract is delivered.[5]

§ 1569. **Apprehension of damage.**—A cause of action to recover damages does not arise from a mere apprehension of injury where no injury has yet been actually sustained. Under the statute of Oklahoma it is unlawful for any person,

it is to be regarded as the law of the case and should have been followed by the jury." Roberts v. Leon Loan & Abstract Co., 63 Iowa, 76, 18 N. W. 702.

[1] Denton v. Nashville Title Co., (Tenn.), 79 S. W. 799.

[2] Denton v. Nashville Title Co., (Tenn.), 79 S. W. 799.

[3] Morange v. Mix, 44 N. Y. 315.

[4] Williams v. Hanley, 16 Ind. App. 464, 45 N. E. 622.

[5] Russell v. Polk Co. Abstract Co., 87 Iowa, 233, 54 N. W. 212, 43 Am. St. Rep. 301; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Owen v. Western Sav. Fund, 97 Pa. St. 47, 39 Am. Rep. 794; Provident Loan Trust Co. v. Wolcott, 5 Kan. App. 473, 47 Pac. 8; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Rankin v. Schaeffer, 4 Mo. App. 108.

firm or corporation to hold themselves out as abstracters and to engage in the business of abstracting title to real property without first filing a bond, and they are liable to any person for whom they may make, compile or furnish abstracts of title to the amount of damage done to such person by any incompleteness, imperfection, or error made in the compilation of the abstract. An action was brought under this statute to recover damages for an alleged failure to show on an abstract certain liens existing on the property. The plaintiff to whom the abstract was furnished had sold the property by a warranty deed, and the grantee had been compelled to pay a certain sum of money to prevent the sale of the property upon an execution based upon a judgment not disclosed by the abstract. The plaintiff brought an action against the abstracter to recover this sum on the theory that he was liable to his grantee, who had paid it, to prevent the execution sale. But the court held that as the plaintiff had not suffered any actual damage, the mere apprehension that he might some time in the future be compelled to indemnify his grantee did not entitle him to recover damages against the abstracter.[6]

[6] Walker v. Bowman, (Okl.), 105 Pac. 648.

APPENDIX.

CHAPTER I.

ACKNOWLEDGMENTS.

F. 1. Certificate of Clerk as to authority of notary.

2. General form of acknowledgment by corporation.

3. Acknowledgment by corporation of deed conveying land in several states.

4–7. Alabama.

8. Alaska.

9–11. Arizona.

12–16. Arkansas.

17–19. California.

20–21. Colorado.

22–23. Connecticut.

24. Delaware.

25. District of Columbia.

26–27. Florida.

28–29. Georgia.

30–31. Hawaii.

32–34. Idaho.

35. Illinois.

36–37. Indiana.

38–41. Iowa.

42–43. Kansas.

44. Kentucky.

45. Louisiana.

46–47. Maine.

F. 48–51. Maryland.

52–59. Massachusetts.

60–63. Minnesota.

64–66. Mississippi.

67–70. Missouri.

71–73. Montana.

74–76. Nebraska.

77–81. Nevada.

82. New Hampshire.

83. New Jersey.

84–87. New Mexico.

88–91. New York.

92–93. North Carolina.

94–97. North Dakota.

98–99. Ohio.

100–101. Oklahoma.

102–104. Oregon.

105–106. Pennsylvania.

107. Rhode Island.

108–109. South Carolina.

110–112. South Dakota.

113–115. Tennessee.

116–118. Texas.

119–123. Utah.

124. Vermont.

125–126. Virginia.

127–129. Washington.

130–134. West Virginia.

135. Wisconsin.

136. Wyoming.

Form 1.

Certificate of Clerk as to Authority of Notary.

City and County of New York, } ss.
STATE OF NEW YORK, }

I, ———, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that ———, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and therein written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county the ——— day of ———, 19—.

Clerk.[1]

Form 2.

General Form of Acknowledgment by Corporation.

Be it remembered that on the ——— day of ———, A. D. 19—, before me (*title of officer*), personally came ———, president of the ——— company, who is known to me to be the person whose name is signed to the foregoing deed of conveyance, who, being by me duly sworn, deposes and says that he resides in the city of ———, in the county of ———, and state of ———, that he is president of the ——— company, that he knows the corporate seal of said company, that the seal affixed to the foregoing conveyance is the corporate seal of said company, that it was affixed by order of said company, and that he signed his name to said

[1] In case the instrument is to be used in England, and it is desired to have an additional certificate of the notary's authority made by the consul-general it may be in the following form:—

HER BRITANNIC MAJESTY'S CONSULATE-GENERAL OF NEW YORK.

I, ———, Esquire, Her Britannic Majesty's consul-general for the states of New York, New Jersey, Connecticut, Rhode Island, and Delaware, do hereby certify that ———, whose true signature and seal are respectively subscribed and affixed to the certificate hereunto annexed, was, on the day of the date thereof, a notary public in and for the state of New York, duly commissioned and sworn, to whose official acts faith and credit are due. In witness whereof I do hereunto set my hand and seal of office at the city of New York, this ——— day of ———, 19—.

By the Consul-General.

conveyance by like order as president of said company; and acknowledged that he executed and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, and that the said company also executed said conveyance as its free and voluntary act for the uses and purposes therein set forth. In witness whereof I have hereunto set my hand and official seal this ——— day of ———, A. D. 19—.

Be it known that on the ——— day of ———, A. D. 19.—, before me, the undersigned, a notary public, duly commissioned in and for said county, and duly authorized to administer oaths and take acknowledgments of deeds, came ———, president, and ———, secretary, of the ——— company, who, by me being duly sworn, did each depose and say that they are respectively the said ———, president, and the said ———, secretary, of the said company; that they know the seal of said company; and that the seal affixed to the foregoing instrument is the corporate seal of said company, and was affixed by order of said company, and that they signed their respective names thereto, the said ———, as president, and the said ———, as secretary, by the like order; and they severally acknowledged the execution thereof to be their free act and deed, and the free act of said ——— company, for the purposes therein expressed. And I certify that they are personally known to me to be the persons they are above described to be, and who executed this instrument. In witness whereof I have hereunto set my hand and affixed my notarial seal on the day and year above named.

Form 3.

Acknowledgment by Corporation of a Deed Conveying Land in Several States.

Be it remembered that on this ——— day of ———, A. D. 19—, before me, ———, a commissioner for the state of ———, ———, and a notary public in and for the state and county of ———, residing in said city of ———, personally appeared ———, the president, and ———, the secretary, of the ——— company, to me personally known to be such respectively, who, being by me severally duly sworn, did depose and say that he, said ———, resides at ———, in the state of ———; that he, said ———, resides in the city of ———, in the state of ———; that he, said ———, is the president, and he, said ———, is the secretary, of the said company; that they both know the corporate seal of said company; that the seal affixed to the foregoing instrument is

such corporate seal; that it was so affixed thereto by order of the board of directors of said company; and that they, the said ——— as such president, and ——— as such secretary, signed the name of such company and their own names thereto, by the like order, as president and secretary of said company; and they each respectively, being personally known to me to be the same persons whose names are signed to the foregoing instrument as parties thereto, acknowledged to me that they signed, sealed, and executed the same as their own free and voluntary act and deed and as the free and voluntary act and deed of the said company, for the purposes and objects therein stated. In witness, etc.

Be it remembered that on this ——— day of ———, A. D. 19—, before me, ———, a commissioner of the state of ———, in and for the state of ———, residing in the city of ———, personally appeared ———, the president of the ——— A. B. Trust Company, of the city of ———, and ———, the actuary of the same company, to me respectively known, who, being by me severally duly sworn, did depose and say that he, the said ———, resided in said city of ———; that he, the said ———, resided in said city of ———; that he, said ——, is the president, and he, said ———, is the actuary, of the said company; that they know the corporate seal of said company, that the seal affixed to the foregoing instrument is such corporate seal, that it was so affixed thereto by order of the board of directors of said company; and they, the said ——— and ———, signed their names thereto, by the like order, as president and actuary of said company respectively; and acknowledged that they executed the foregoing instrument as their free act and deed, and the free act and deed of said company. In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

Be it remembered that on this ——— day of ———, A. D. 19—, before me, a notary public in and for said county, at my office in said city of ———, personally came ———, president of the ——— company, the corporation described in the foregoing instrument as the party of the first part thereto, and who is personally well known to me; and he, being by me duly sworn, did depose and say that he is, and at the time of the execution of said instrument was, the president, and that ——— is, and then was, the secretary of the said company; that he knows the corporate seal of said company, and the seal affixed to the foregoing instrument as such is said corporate seal; that the said seal was so affixed by authority of the board of directors of said company; and that he, as president aforesaid, signed, and the said———,

as secretary, attested, the said instrument, by like authority. And the said ———, president as aforesaid, acknowledged the execution of said instrument as the act and deed of the said ——— company, for the uses and purposes therein expressed. In witness whereof I have hereunto subscribed my name and affixed my official seal, at my office in the said city of ———, the day and year aforesaid.

Form 4.

ALABAMA: *General Form.*

[Venue.]

I (*name and style of the officer*), hereby certify that ———, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily, on the day the same bears date. Given under my hand this ——— day of ———, A. D. ———.

Form 5.

Conveyance of Homestead by Wife.

I (*name and style of the officer*), hereby certify that on the ——— day of ——— A. D. ———, came before me the within named ———, known to me (*or* made known to me) to be the wife of the within named ———, who, being examined separate and apart from the husband touching her signature to the within conveyance, acknowledged that she signed her name of her own free will and accord, and without fear, constraint, or threats on the part of the husband. In witness whereof I hereto set my hand this ——— day of ———, A. D. ———.

Form 6.

Proof by Subscribing Witness.

I (*name and style of the officer*), hereby certify that ———, a subscribing witness to the foregoing conveyance, known to me, appeared before me this day, and, being sworn, stated that ———, the grantor, voluntarily executed the same in his presence, and in the presence of the other subscribing witness, on the day the

same bears date; that he attested the same in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence. Given under my hand this ——— day of ———, A. D. ———.

Form 7.

Acknowledgement by Corporation.

STATE OF ALABAMA, ——— COUNTY:

I, ——— a ——— in and for said county and state, hereby certify that ———, whose names (*treasurer or other officer*) of the ———, a corporation, is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he as such officer and with full authority executed the same voluntarily for and as the act of said corporation.

Given under my hand this ——— day of ———, 19—.

Form 8.

ALASKA.

See the forms given for California.

Form 9.

ARIZONA: *General Form.*

Before me, ——— (*name and official title*), on this day personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office, this ——— day of ———, A. D. ———.

My commission expires the ——— day of ———, A. D. ———.

R. S. 1901, Arizona, § 746.

If the grantor is unknown to the officer, the certificate may be in this form:—

satisfactorily proved to me to be the person described in and who executed the within conveyance, by the oath of ———, a competent and credible witness for that purpose, by me duly sworn, and he, the said ———, acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

Form 10.

Married Woman Conveying Homestead.

Before me, ——— (*name and official title*), on this day personally appeared ———, wife of ———, known to me (*or* proved to me on oath of ———) to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office, this ——— day of ———, A. D. ———.

My commission expires the ——— day of ———, A. D. ———.

Form 11.

Proof by Subscribing Witness.

Before me, ——— (*name and official title*), on this day personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me stated on oath that he saw ———, the grantor or person who executed the foregoing instrument, subscribe the same (*or* that the grantor or person who executed such instrument of writing acknowledged in his presence that he had executed the same for the purposes and consideration therein expressed), and that he had signed the same as a witness at the request of the grantor (*or* person who executed the same). Given under my hand and seal of office, this ——— day of ———, A. D.

Form 12.

ARKANSAS: *General Form.*

On this ——— day of ———, 19—, before me ———, a justice of the peace within and for the county of ———, in the state of Arkansas, appeared in person ———, to me personally well known[1] as the person whose name appears upon the within and foregoing deed of conveyance as the party grantor, and stated that he had executed the same for the consideration and pur-

[1] If the grantor is unknown to the justice, instead of the words,—
to me personally well known as the person,
insert,
who, being unknown to me, was proven to my satisfaction to be the identical ——— whose name appears upon the within and foregoing deed as the party grantor, by the oath of ——— and ———, witnesses sworn and examined by me as to such identity, and stated, etc.

poses therein mentioned and set forth, and I do hereby so certify. In testimony whereof I have hereunto set my hand as such justice of the peace, in the county of ———, on the ——— day of ———, 19—.

Form 13.

Single Man, or Married or Single Woman.

Be it remembered that before me, ——— (*name and style of officer*), duly commissioned and acting within and for said county and state, personally appeared on this ——— day of ———, ———, to me well known (*or* made known as above) as the grantor in the foregoing deed, and acknowledged that she (*or* he) executed the same for the consideration and purposes therein mentioned and set forth. And I do so certify. Given under my hand this ——— day of ———, 19—.

[1] Digest of Stats. 1904, Ark., p. 1672.

Form 14.

Husband and Wife of a Joint Deed of the Homestead.

Be it remembered that on this day came before me the undersigned, a justice of the peace within and for the county and state aforesaid, duly commissioned and acting, ——— and ———, his wife, to me well known (*or* made known as above), as the grantors in the foregoing deed, and stated that they had each executed the same for the considerations and purposes therein mentioned and set forth.

And on the same day also appeared before me the said ———, wife of said ———, to me well known, and in the absence of her said husband declared that she had, of her own free will, signed the relinquishment of dower and homestead, in the said deed for the purposes therein contained and set forth, without compulsion or undue influence of her husband.

Witness my hand as justice of the peace this ——— day of ———, 19—.

The same form is used for relinquishment of dower or homestead only.

Digest of Stats. 1904, Ark., p. 1672.

Form 15.

Proof of Deed by Subscribing Witness.[1]

Be it remembered that on this ——— day of ———, 19—,

before me, ———, a justice of the peace in and for the county aforesaid, personally appeared ———, one of the subscribing witnesses to the foregoing deed, to me personally well known, who, being by me first duly sworn, on his oath stated that he saw ———, grantor in said deed, subscribe said deed on the day of its date (*or* that the said ———, grantor in said deed, acknowledged in his presence, on the ——— day of ———, 19—, that he had subscribed and executed said deed), for the uses, purposes, and consideration therein expressed; and that he and ———, the other subscribing witness, subscribed the same as attesting witnesses at the request of said grantor. In testimony whereof I have hereunto set my hand as such justice of the peace, at the county aforesaid, this ——— day of ———, 19—.

[1] Digest of Stats. 1904, Ark. p. 1672.

Form 16.

Proof of Handwriting of Grantor and Subscribing Witness.[1]

Be it remembered that on this ——— day of ———, 19—, before me, ———, a justice of the peace in and for the county aforesaid, came ——— and ———, and upon their oaths stated that the signatures of ———, the grantor in the within and foregoing deed, and of ———, witness thereto, are genuine, and are in the handwriting of the said ——— and ——— respectively. In testimony whereof I have hereunto set my hand as such justice of the peace, in the county aforesaid, this ——— day of ———, 19—.

[1] Digest of Stats. Ark., 1904, p. 1672.

Form 17.

CALIFORNIA: *General Form.*

State of ———, County of ———, ss. On this ——— day of ———, in the year ———, before me (*here insert name and quality of the officer*), personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she *or* they) executed the same.

Civil Code § 1189.

Form 18.

By Corporation.

State of ———, County of ———, ss. On this ——— day of ———, in the year, ———, before me (*insert name and quality*

of the officer), personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the president (or secretary) of the corporation that executed the within instrument (*where, however, the instrument is executed on behalf of the corporation by some one other than the president or secretary insert, known to me (or proved to me on the oath of ———) to be the person who executed the within instrument on behalf of the corporation therein named*), and acknowledged to me that such corporation acknowledged the same.

Form 19.

By Attorney in Fact.

State of ———, County of ———, ss. On this ——— day of ———, in the year ———, before me (*insert the name and quality of the officer*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of ———thereto as principal and his own name as attorney in fact.

Form 20.

COLORADO: *General Form.*

State of ———, county of ———, ss. ——— appeared before me this ——— day of ———, 19—, in person, and acknowledged the foregoing instrument to be his act and deed for the uses specified therein. Witness my hand and official seal. (*Title of officer.*)

It is provided by statute that no officer shall certify an acknowledgment unless the person making the same shall be personally known to such officer to be the identical person he represents himself to be, or shall be proved to be such by at least one credible person known to such officer; but it shall not be necessary to state such fact in his certificate of acknowledgement attached to any instrument affecting the title to real property, except when it is intended to convey or mortgage a homestead, and in such case the acknowledgment shall contain the additional words. R. S. 1908, § 691.

Form 21.

By a Corporation.

Be it remembered that on this ——— day of ———, A. D. 19—, before me (*title of officer*), residing in the city of ———, county of ———, and state of ———, duly commissioned to take acknowledgments and proofs of deeds and other instruments in

writing under seal, personally came ———, president of the ——— company, who is known to me to be the person whose name is signed to the foregoing deed of conveyance, who, being by me duly sworn, deposes and says that he resides in ———, in the county of ———, and state of ———; that he is president of the ——— company; that the seal affixed to the foregoing conveyance is the corporate seal of said company; that it was affixed by order of said company; and that he signed the corporate name of said company to said conveyance by like order, as president of said company; and acknowledged that he executed and delivered the said deed on behalf of said company as his free and voluntary act, and that the said company also executed said conveyance as its free and voluntary act, for the uses and purposes therein set forth. In witness whereof I have hereunto set my hand and official seal this ——— day of ———, A. D. 19—.

Form 22.

CONNECTICUT: *General Form.*

State of ———, county of ———, A. D. 19—. Personally appeared ———, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed, before me, ———.

Form 23.

By Husband and Wife.

Then and there before me, ———, duly commissioned and acting as such, personally appeared ——— and ———, his wife, signers and sealers of the foregoing instrument, and severally acknowledged the same to be their free act and deed before me. Witness my hand and seal of office on this ——— day of ———, 19—.

Form 24.

DELAWARE: *By Husband and Wife.*

Be it remembered that on this ——— day of ———, A. D. 19—, personally came before me (*name and title*) ——— and ———, his wife, parties to this indenture, known to me personally (*or* proved on the oath of ———) to be such, and severally acknowledged this indenture to be their deed, and the said ———, being at the same time privately examined by me apart from her husband,

acknowledged that she executed the said indenture willingly, without compulsion or threats, or fear of her husband's displeasure. Given under my hand and official seal the day and year aforesaid.[1]

Form 25.

DISTRICT OF COLUMBIA: *General Form of Certificate.*

I (*name and official title*), in and for the county aforesaid, in the state of ———, do hereby certify that ———, a party to a certain deed, bearing date on the ——— day of ———, and hereunto annexed, personally appeared before me in the District, the said ——— being personally known to me as (*or* proved by the oaths of credible witnesses before me to be) the person who executed the said deed, and acknowledged the same to be his act and deed. Given under my hand and seal this ——— day of ———.

See Code 1905, §§ 495, 496, 515.

Form 26.

FLORIDA: *General Form.*

On this day personally appeared before me (*name and official title*) ———, to me well known as the person described in and who executed the foregoing instrument, and acknowledged that ——— executed the same for the purpose therein expressed. In witness whereof I have herunto affixed my hand and official seal at ———, this ——— day of ———, 19—.

Form 27.

By Husband and Wife Out of the State for the Purpose of Relinquishing Dower.

On this day personally appeared before me (*name and official title*) ——— and ———, his wife, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged the execution thereof to be their free act and deed for the uses and purposes therein mentioned. And the said ———, wife of the said ———, on a private examination by me separate and apart from her husband, did acknowledge that the said instrument was by her executed and made freely and

[1] R. C. 1893, c. 36, § 8. This form should be changed where an acknowledgment is made by a single grantor, or by a married woman separately from her husband.

voluntarily, and without any compulsion, constraint, apprehension, or fear of or from her said husband, for the purpose of renouncing and relinquishing all and every right of dower in the lands in the said conveyance described. In witness whereof, etc.

See G. S. 1906, §§ 2481, 2482, 2486.

Form 28.

GEORGIA: *Proof by Subscribing Witness.*

Before me (*name and official title*) personally came ———, to me known to be the individual whose signature is affixed to the foregoing deed as one of the witnesses thereto, who being sworn says that he was present at the time when said deed was executed; that he saw the same signed, sealed, and delivered by ———, whose signature is thereto affixed as grantor; that ———, the other subscribing witness thereto, was likewise present at said time, and witnessed said execution of said deed; and that he, the said ———, and the said ——— then and there signed the same as attesting witnesses. (*Signature of witness.*)

Sworn to and subscribed before me this ——— day of ———, 19—.

Form 29.

Declaration of Married Woman to Convey Her Interest in Lands.

I, ———, the wife of ———, do declare that I have freely and without any compulsion signed, sealed, and delivered the above instrument of writing, passed between ——— and ———, and I do hereby renounce all title or claim of dower that I might claim or be entitled to after the death of ———, my said husband, to or out of the lands or tenements therein conveyed. In witness whereof I have hereunto set my hand and seal.

See 2 Code 1895, §§ 3620, 3621, 3622. Supp. to Code 1901, § 6184.

Form 30.

HAWAII: *General Forms.*

On this ——— day of ———, A. D. ———, personally appeared before me A. B., known to me to be the person described in, and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein set forth.[2]

[2] Rev. Laws 1905, § 2361.

Form 31.

General Form when Person Offering Acknowledgment is Not Known to Officer.

On this ——— day of ———, A. D. ———, personally appeared before me A. B., satisfactorily proved to me to be the person described in, and who executed, the within instrument, by the oath of C. D., a credible witness for that purpose, to me known and by me duly sworn, and he, the said A. B., acknowledged that he executed the same freely and voluntarily, for the uses and purposes therein set forth.

Form 32.

IDAHO: *General Form.*

On this ——— day of ———, in the year ———, before me (*name and official title*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument and acknowledged to me that he (*or* they) executed the same. In witness whereof, etc.

Form 33.

For Corporation.

On this ——— day of ———, in the year ———, before me (*name and official title*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the president (*or* the secretary) of the corporation that executed the instrument, and acknowledged to me that such corporation executed the same.

Form 34.

For Attorney in Fact.

On this ——— day of ———, in the year ———, before me (*name and official title*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of ——— thereto as principal, and his own name as attorney in fact.

See Civil Code 1901, §§ 2420–2422: A married woman may acknowledge as though she were single. Acts. 1907, p. 5.

Form 35.

ILLINOIS: *By Husband and Wife with Release of Homestead.*

I (*name and title of officer*) do hereby certify that ——— and ———, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.[1] Given under my hand and official seal this ——— day of ———, A. D. 19—.

Form 36.

INDIANA: *General Form.*

Before me (*name and title of officer*), this ——— day of ———, ———acknowledged the execution of the annexed deed (*or* mortgage).

Form 37.

For Husband and Wife.

On this ——— day of ———, A. D. 19—, before me (*name and title of officer*), ——— and ———, his wife, severally acknowledged the execution of the foregoing deed. In witness whereof I have hereunto set my hand and affixd my official seal the day and year aforesaid.

See 2 Ann Stats. Rev. 1908, §§ 3952, 3969.

Form 38.

IOWA.

1. *Natural Persons Acting in Their Own Right.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ——— (*or* ——— and ———), to me known to be the person (*or* persons) described in and who executed the forego-

[1] The words,—
"including the release and waiver of the right of homestead,"
or other words to similar effect, are necessary to effectuate a release of the homestead. R. S. 1908, c. 30, §§ 26, 27, 11.

ing instrument, and acknowledged that he (*or* they) executed the same as his (*or* their) voluntary act and deed.

If a married woman unites with her husband in the execution of any such instrument, and acknowledges the same, she may be described in the acknowledgment as his wife; but in all other respects her acknowledgment may be taken and certified as if she were sole, unless a separate examination in respect to the execution of any release of dower, or other instrument affecting real estate, is required by some statute.

See Civ. Code 1897, §§ 2946, 2959; Code Supp. 1907, § 2943.

Form 39.

2. *Natural Persons Acting by Attorney.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ———, to me known to be the person who executed the foregoing instrument in behalf of ———, and acknowledged that he executed the same, as the free act and deed of said ———.

Form 40.

3. *Corporations or Joint Stock Associations.*

[Venue.]

On this ——— day of ———, 19—, before me appeared ———, to me personally known, who, being by me duly sworn (*or* affirmed), did say that he is the president (*or* other officer or agent of the corporation or association) of (*describing the corporation or association*), and that the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association) by authority of its board of directors (*or trustees*), and said ——— acknowledged said instrument to be the free act and deed of said corporation (*or* association).

Where the corporation or association has no corporate seal, the words,—"the seal affixed to said instrument is the corporate seal of said corporation (or association), and that," should be omitted and, at the end of the affidavit clause, the words,—"and that said corporation (or association) has no corporate seal" should be added.

The signature and title of the officer taking the acknowledgment should be added.

Form 41.

Form of Authentication.

The authentication of the proof of acknowledgment of a deed or other written instrument when taken without the state and within any other state, territory, or district of the United States, or any form substantially in compliance with the above, may be in the following form:

I, ———, clerk of the ——— court in and for said county, which court is a court of record, having a seal, (*or,* I, ———, the secretary of state of such state or territory), do hereby certify that ——— by and before whom the foregoing acknowledgment (*or* proof) was taken, was, at the time of taking the same, a notary public, (*or* other officer) residing (*or* authorized to act) in said county, and was duly authorized by the laws of said state (territory, or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory, or district), and further that I am well acquainted with the handwriting of said ———, and that I verily believe that the signature to said certificate of acknowledgment (*or* proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (*or* state) this ——— day of ———, 19—.

Form 42.

KANSAS: *General Form.*

Be it remembered that on this ——— day of ———, A. D. 19—, before me, the undersigned (*official title*), came ———, who is personally known to me to be the same person who executed the foregoing instrument of writing, and as such person duly acknowledged the execution of the same. In witness whereof I have hereunto set my hand and affixed my official seal at ———, the day and year last above written.

Form 43.

By a Corporation.

On this ——— day of ———, A. D. 19—, before me (*title of officer*), in and for said county, came ———, president of the ——— Company, personally known to me as being the identical person whose name is affixed to the foregoing deed as president of said railway company, and in behalf of said railway company acknowledged the same to be his own voluntary act and deed, and that he voluntrily affixed thereto the corporate seal of said company, and caused the same to be attested by the secretary of said com-

pany, and that said deed was so executed by order of the board of directors of said company. In testimony whereof I have hereunto set my hand and notarial seal the day and year last above written.

See G. S. 1905, §§ 1282, 1283, 1298, 4212.

Form 44.

KENTUCKY.

Certificate of Acknowledgment by Husband and Wife Taken Out of the State.

I, ——— (*here give title*), do certify that this instrument of writing from ——— and wife ——— was this day produced to me by the parties, and which was acknowledged by the said ——— to be his act and deed, and the contents and effect of the instrument being explained to the said ——— by me, separately and apart from her husband, she thereupon declared that she did freely execute and deliver the same to be her act and deed, and consented that the same might be recorded. Given under my hand and seal of office this ——— day of ———, 19—.

Form 45.

LOUISIANA.

Acknowledgment by Husband and Wife Taken Out of the State.

Be it remembered that on this ——— day of ———, A. D. 19—, before me, the undersigned (*official title*), personally came and appeared the above named ———, and ———, his wife, and executed the above act of ratification in my presence and that of the two witnesses whose names are thereto subscribed as such; and thereupon said ———, and ———, his wife, acknowledged that they had signed and executed the same as their act and deed for the consideration, uses, and purposes therein mentioned. In testimony whereof I have hereunto set my hand and affixed my seal of office as ——— aforesaid, at my office in said ———, of ———, on the day and date ——— above written.

MAINE: *General Form.*

Personally appeared the above named ———, and acknowledged the above instrument to be his free act and deed. Before me (*name and official title*).

Form 47.

Certificate When an Acknowledgment is Taken Out of the State.

On this ——— day of ———, A. D. 19—, personally appeared before me (*name and title of officer*), the above named ———, and acknowledged the foregoing instrument to be his free act and deed. In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Form 48.

MARYLAND: *Statutory Forms.*

Acknowledgment Within the State.

I hereby certify that on this ——— day of ———, in the year ———, before the subscriber (*style of officer*), personally appeared ———, and acknowledged the foregoing deed to be his act.

Pub. G. L. 1904, art. 21, §§ 65-67.

Form 49.

Form of Acknowledgment Taken Within the State of Husband and Wife.

I hereby certify that on this ——— day of ———, in the year ———, before the subscriber (*official style of the officer*) personally appeared ———, and ———, his wife, and did each acknowledge the foregoing deed to be their respective act.

Form 50.

Acknowledgment Taken Out of the State.

I hereby certify that on this ——— day of ———, in the year ———, before the subscriber (*official style of the officer*) personally appeared ———, and acknowledged the foregoing deed to be his act. In testimony whereof I have caused the seal of the court to be affixed (*or* have affixed my official seal) this ——— day of ———, A. D. ———.

Form 51.

By a Corporation.

Be it remembered that on this ——— day of ———, in the year 19—, before the subscriber, a justice of the peace of said ———, in and for said ———, personally appeared ———, the attorney of the ——— Company named in the foregoing instrument of writing, and acknowledged the same to be the act and deed of the ———Company.

Form 52.

MASSACHUSETTS.

1. *Natural Persons Acting in Their Own Right.*

[Venue.]
On this ——— day of ———, 19—, before me personally appeared ——— (*or* ——— and ———), to me known to the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (*or* they) executed the same as his (*or* their) free act and deed.

If a married woman unites with her husband in the execution of any such instrument, and acknowledges the same, she may be described in the acknowledgment as his wife; but in all other respects her acknowledgment may be taken and certified as if she were sole, unless a separate examination in respect to the execution of any release of dower, or other instrument affecting real estate, is required by some statute.

See Acts 1894, c. 253: Rev. Laws 1902 c. 127, §§ 18–22.

Form 53.

2. *Natural Persons Acting by Attorney.*

[Venue.]
On this ——— day of ———, 19—, before me personally appeared ———, to me known to be the person who executed the foregoing instrument in behalf of ———, and acknowledged that he executed the same, as the free act and deed of said ———.

Form 54.

3. *Of Corporations or Joint Stock Associations.*

[Venue.]
On this ——— day of ———, 19—, before me appeared ———, to me personally known, who, being by me duly sworn

(*or* affirmed) did say that he is the president (*or* other officer or agent of the corporation or association) of (*describing the corporation or association*), and that the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association) by authority of its board of directors (*or* trustees), and said ——— acknowledged said instrument to be the free act and deed of said corporation (*or* association).

Where the corporation or association has no corporate seal, the words,—"The seal affixed to said instrument is the corporate seal of said corporation (or association), and that," should be omitted
and, at the end of the affidavit clause, the words,—
"and that said corporation (or association) has no corporate seal," should be added.

The signature and title of the officer taking the acknowledgment should be added.

Form 55.

Form of Authentication.

The authentication of the proof of acknowledgment of a deed or other written instrument when taken without the state and within any other state, territory, or district of the United States, or any form substantially in compliance with the above, may be used in the following form:

[Venue.]

I, ———, clerk of the ——— court in and for said county, which court is a court of record, having a seal, (*or*, I, ———, the secretary of state of such state or territory), do hereby certify that ——— by and before whom the foregoing acknowledgment (*or* proof) was taken, was, at the time of taking the same, a notary public, (*or* other officer) residing (*or* authorized to act) in said county, and was duly authorized by the laws of said state (territory, or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory, or district), and further that I am well acquainted with the handwriting of said ———, and that I verily believe that the signature to said certificate of acknowledgment (*or* proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (*or* state) this ——— day of ———, 19—.

Form 56.

MICHIGAN.

1. *Natural Persons Acting in Their Own Right.*

[Venue.]

On this ——— day of ———, 19—, before me personally ap-

peared ——— (*or* ——— and ———), to me known to be the person (*or* persons) described in and who executed the foregoing instrument, and acknowledged that he (*or* they) executed the same as his (*or* their) free act and deed.

If a married woman unites with her husband in the execution of any such instrument, and acknowledges the same, she may be described in the acknowledgment as his wife; but in all other respects her acknowledgment may be taken and certified as if she were sole, unless a separate examination in respect to the execution of any release of dower, or other instrument affecting real estate, is required by some statute.

See Pub. Acts 1895, p. 346; Comp. Laws, 1897, c. 127 §§ 18–22.

Form 57.

2. *Natural Persons Acting by Attorney.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ———, to me known to be the person who executed the foregoing instrument in behalf of ———, and acknowledged that he executed the same, as the free act and deed of said ———.

Form 58.

3. *Corporations or Joint Stock Associations.*

[Venue.]

On this ——— day of ———, 19—, before me appeared ———, to me personally known, who, being by me duly sworn (*or* affirmed), did say that he is the president (*or* other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association) by authority of its board of directors (*or* trustees), and said ——— acknowledged said instrument to be the free act and deed of said corporation (*or* association).

Where the corporation or association has no corporate seal, omit the words,—

"The seal affixed to said instrument is the corporate seal of said corporation (or association), and that," should be omitted

and, at the end of the affidavit clause, the words,—

"and that said corporation (or association) has no corporate seal," should be added.

The signature and title of the officer taking the acknowledgment should be added.

Form 59.

Form of Authentication.

The authentication of the proof of acknowledgment of a deed or other written instrument when taken without the state and within any other state, territory or district of the United States, or any form substantially in compliance with the above, may be in the following form:

[Venue.]

I, ———, clerk of the ——— court in and for said county, which court is a court of record, having a seal, (*or*, I, ———, the secretary of state of such state or territory), do hereby certify that ——— by and before whom the foregoing acknowledgment (*or* proof) was taken, was, at the time of taking the same, a notary public, (*or* other officer) residing (*or* authorized to act) in said county, and was duly authorized by the laws of said state (territory, or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory, or district), and further that I am well acquainted with the handwriting of said ———, and that I verily believe that the signature to said certificate of acknowledgment (*or* proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (*or* state) this ——— day of ———, 19—.

Form 60.

MINNESOTA.

1. *Natural Persons Acting in Their own Right.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ——— (*or* ——— and ———), to me known to be the person (*or* persons) described in and who executed the foregoing instrument, and acknowledged that he (*or* they) executed the same as his (*or* their) free act and deed.

If a married woman unites with her husband in the execution of any such instrument, and acknowledges the same, she may be described in the acknowledgment as his wife; but in all other respects her acknowledgment may be taken and certified as if she were sole, unless a separate examination in respect to the execution of any release of dower, or other instrument affecting real estate, is required by some statute.

See Laws 1883, p. 99; Rev. Laws 1905, § 2684.

Form 61.

2. *Natural Persons Acting by Attorney.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ———, to me known to be the person who executed the foregoing instrument in behalf of ———, and acknowledged that he executed the same, as the free act and deed of said ———.

Form 62.

3. *Corporations or Joint Stock Associations.*

[Venue.]

On this ——— day of ———, 19—, before me appeared ———, to me personally known, who, being by me duly sworn (*or* affirmed), did say that he is the president (*or* other officer or agent of the corporation or association) of (describing the corporation (*or* association), and that the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association) by authority of its board of directors (*or* trustees), and said ——— acknowledged said instrument to be the free act and deed of said corporation (*or* association).

Where the corporation or association has no corporate seal, the words,—
"The seal affixed to said instrument is the corporate seal of said corporation (or association), and that," should be omitted
and, at the end of the affidavit clause, the words,—
"and that said corporation (or association) has no corporate seal," should be added.

The signature and title of the officer taking the acknowledgment should be added.

Form 63.

Form of Authentication.

The authentication of the proof of acknowledgment of a deed or other written instrument when taken without the state and within any other state, territory or district of the United States, or any form substantially in compliance with the above, may be used in the following form:

[Venue.]

I, ———, clerk of the ——— court in and for said county, which court is a court of record, having a seal, (*or*, I, ———, the secretary of state or territory), do hereby certify that ——— by and before whom the foregoing acknowledgment (*or* proof) was

taken, was, at the time of taking the same, a notary public, (*or* other officer) residing (*or* authorized to act) in said county, and was duly authorized by the laws of said state (territory, or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory, or district), and further that I am well acquainted with the handwriting of said ———, and that I verily believe that the signature to said certificate of acknowledgment (*or* proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (*or* state) this ——— day of ———, 19—.

Form 64.

MISSISSIPPI: *General Form.*

Personally appeared before me (*name and title of officer*) the within named ———, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned. Given under my hand this ——— day of ———, A. D. 19—.

Form 65.

Husband and Wife.

Personally appeared before me (*name and title of officer*) the within named ———, and ———, his wife, who acknowledged that they signed and delivered the foregoing deed on the day and year therein mentioned. Given under my hand and seal this ———day of ———, A. D. 19—.

Form 66.

Proof by Subscribing Witness of an Unacknowledged Deed.

Personally appeared before me (*name and title of officer*) the within ———, one of the subscribing witnesses to the foregoing instrument, who, being first duly sworn, deposeth and saith that he saw the within (*or* above) named (*grantor*), whose name is subscribed thereto, sign and deliver the same to the said (*grantee*) [*or* that he heard the said (*grantor*) acknowledge that he signed and delivered the same to the said (*grantee*)], that he, this affiant, subscribed his name as a witness thereto, in the presence of the said (*grantor*).

[1] Code 1906, § 2799.

Form 67.

MISSOURI.

1. *Natural Persons Acting in Their Own Right.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ——— (*or* ——— and ———), to me known to be the persons (*or* persons) described in and who executed the foregoing instrument, and acknowledged that he (*or* they) executed the same as his (*or* their) free act and deed.

If a married woman unites with her husband in the execution of any such instrument, and acknowledges the same, she may be described in the acknowledgment as his wife; but in all other respects her acknowledgment may be taken and certified as if she were sole, unless a separate examination in respect to the execution of any release of dower, or other instrument affecting real estate, is required by some statute.

See Laws 1883, p. 20; Ann Stat. 1906, § 913.

Form 68.

2. *Natural Persons Acting by Attorney.*

[Venue.]

On this ——— day of ———, 19—, before me personally appeared ———, to me known to be the person who executed the foregoing instrument in behalf of ———, and acknowledged that he executed the same, as the free act and deed of said ———.

Form 69.

3. *Corporations or Joint Stock Association.*

[Venue.]

On this ——— day of ———, 19—, before me appeared ———, to me personally known, who, being by me duly sworn (*or* affirmed), did say that he is the president (*or* other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association) by authority of its board of directors (*or* trustees), and said ——— acknowledged said instrument to be the free act and deed of said corporation (*or* association).

Where the corporation or association has no corporate seal, the words,—
should be omitted "the seal affixed to said instrument is the corporate seal of said corporation (or association), and that,"
and at the end of the affidavit clause, the words,—

"and that said corporation (or association) has no corporate seal," should be added.

The signature and title of the officer taking the acknowledgment should be added.

Form 70.

Form of Authentication.

The authentication of the proof of acknowledgment of a deed or other written instrument when taken without the state and within any other state, territory, or district of the United States, or any form substantially in compliance with the above, may be in the following form:

[Venue.]

I, ———, clerk of the ——— court in and for said county, which court is a court of record, having a seal, (*or,* I, ———, the secretary of state of such state or territory), do hereby certify that ——— by and before whom the foregoing acknowledgement (*or* proof) was taken, was, at the time of taking the same, a notary public, (*or* other officer) residing (*or* authorized to act) in said county, and was duly authorized by the laws of said states (territory, or district) to take and certify acknowledgments or proofs of deeds of land in said state (territory, or district). and further that I am well acquainted with the handwriting of said ———, and that I verily believe that the signature to said certificate of acknowledgment (*or* proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (*or* state) this ——— day of ———, 19—.

Form 71.

MONTANA: *General Form.*

On this ——— day of ———, in the year ———, before me (*here insert the name and quality of the officer*), personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (*or* they) executed the same.

Form 72.

For Corporation.

On this ——— day of ———, in the year, before me (*here insert name and quality of the officer*), personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the president (*or* secretary) of the corporation that executed

the within instrument, and acknowledged to me that such corporation executed the same.[1]

Form 73.

By Attorney in Fact.

On this ——— day of ———, in the year ———, before me (*here insert name and quality of the officer*), personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of ——— thereto as principal, and his own name as attorney in fact; in Ann. Stats. 1906, § 1612.

Form 74.

NEBRASKA: *General Form.*

On this ——— day of ———, A. D. 19—, before me (*name and official title*) personally came the above named ———, who is personally known (*or* on the oath of ———, a credible witness for that purpose by me duly sworn, satisfactorily proved) to me to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the instrument to be his voluntary act and deed.

Witness my hand and seal of office at ———, the date aforesaid.

Form 75.

By Husband and Wife.

On this ——— day of ———, 19—, personally appeared before me (*here insert name and title in full of officer*), in and for said county, ———, and ———, his wife, whose names are subscribed to the anexed instrument as parties thereto, personally known (*or* on the oaths of *one or more witnesses* for that purpose by me duly sworn, satisfactorily proved) to me be the individuals described in and who executed the said annexed instrument as parties thereto, and they severally acknowledged the same to be their voluntary act and deed. In witness whereof I have hereunto set my hand (and affixed my official seal) the day and year first above written.

[1] Ann. Stats. 1906, Ibid. § 1610.

Form 76.

By a Corporation.

On the ——— day of ———, A. D. 19—, before me, ———, a commissioner of the state of ———, at ———, in state of ———, duly appointed and commissioned by the governor of the state of ———, personally appeared ———, the president of the ——— Company, to me personally known to be the identical person whose name is affixed to the foregoing instrument as the president of said railway company, and acknowledged the same to be the voluntary act and deed of said ——— Company.

In testimony whereof I have hereunto set my hand and official seal at ———, in said county, the day and year last written.

See Ann. Stat. 1907 §§ 10803–10806.

Form 77.

NEVADA: *Statutory Form.*

On this, the ——— day of ———, A. D. ———, personally appeared before me, a notary public (*or* judge *or other officer, as the case may be*), in and for ——— county, A. B., known (*or* proved) to me to be the person described in, and who executed, the foregoing instrument, who acknowledged to me that he (or she) executed the same freely and voluntarily and for the uses and purposes therein mentioned.

Laws 1908–09, p. 270.

Form 78.

By Husband and Wife.

On this ——— day of ———, A. D. 19—, personally appeared before me (*name and title of officer*), in and for said county ———, and ———, his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known (*or* proved) to me to be the individuals described in and who executed the said annexed instrument as parties thereto, who each acknowledged to me that they, each of them respectively, executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

Form 79.

By Corporation.

On this ——— day of ———, A. D. ———, personally appeared before me, a notary public (*or* judge *or other officer, as the case may be*), in and for ——— county, A. B., known (*or* proved) to me to be the president (vice-president or secretary) of the corporation that executed the foregoing instrument, and, upon oath did depose that he is the officer of such corporation as above designated; that he is acquainted with the seal of said corporation, of said corporation; that the signatures to said instrument were and that the seal affixed to said instrument is the corporate seal made by officers of said corporation as indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily for the uses and purposes therein mentioned.

Laws 1908-09, p. 270.

Form 80.

By Attorney in Fact.

On this ——— day of ———, A. D. ———, personally appeared before me, a notary public (*or* judge *or other officer, as the case may be*), in and for ——— county, A. B., known (*or* proved) to me to be the person whose name is subscribed to the within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of said ——— thereto as principal, and his own name as attorney in fact, freely and voluntarily and for the uses and purposes therein mentioned.

Laws 1908-09, p. 270.

Form 81.

When the grantor is unknown to the officer he should insert in certificate, "satisfactorily proved to me to be the person described in and who executed the within conveyance, by the oath of ———, a competent and credible witness for that purpose by me duly sworn, and he, the said ———, grantor, acknowledged that he executed," etc.

Comp. Laws 1900, §§ 2577, 2578.

Form 82.

NEW HAMPSHIRE: *Form for Husband and Wife.*

Personally appeared the above named ———, and ———, his wife, and acknowledged the foregoing instrument to be their vol-

untary act and deed. Before me, this ———day of ———, 19—.
P. S. 1901, c. 137, § 3.

Form 83.

NEW JERSEY: *By Husband and Wife.*

Be it remembered that on this ——— day of ———, in the year 19—, before me (*name and official title*) personally appeared ———, and ———, his wife, who, I am satisfied, are the grantors mentioned in and who executed the above deed or conveyance; and, I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed, and delivered the same as their voluntary act and deed; and the said ———, being of full age, on private examination apart from her husband, before me further acknowledged that she signed, sealed, and delivered the same as her voluntary act and deed, freely, without any fear, threats, or compulsion of or from her said husband. All of which is hereby certified under my hand and official seal at ———, the day and year aforesaid.
See Laws, 1903, c. 217.

Form 84.

NEW MEXICO.

1. *Natural Persons Acting in Their Own Right.*

[Venue.]
On this ——— day of ———, 19—, before me personally appeared ——— (*or* ——— and ———), to me known to be the persons (*or* persons) described in and who executed the foregoing instrument, and acknowledged that he (*or* they) executed the same as his (*or* their) free act and deed.
If a married woman unites with her husband in the execution of any such instrument, and acknowledges the same, she may be described in the acknowledgment as his wife; but in all other respects her acknowledgment may be taken and certified as if she were sole, unless a separate examination in respect to the execution of any release of dower, or other instrument affecting real estate, is required by some statute.

Form 85.

2. *Natural Persons Acting by Attorney.*

[Venue.]
On this ——— day of ———, 19—, before me personally appeared ———, to me known to be the person who executed the

foregoing instrument in behalf of ———, and acknowledged that he executed the same, as the free act and deed of said ———.

Form 86.

3. *Corporations or Joint Stock Associations.*

[Venue.]

On this ——— day of ———, 19—, before me appeared ———, to me personally known, who, being by me duly sworn (*or* affirmed), did say that he is the president (*or* other officer or agent of the corporation or association) of (describing the corporation *or* association), and that the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association), and that said instrument was signed and sealed in behalf of said corporation (*or* association) by authority of its board of directors (*or* trustees), and said ——— acknowledged said instrument to be the free act and deed of said corporation (*or* association).

Where the corporation or association has no corporate seal, the words, ———

"the seal affixed to said instrument is the corporate seal of said corporation (*or* association), and that," should be omitted and at the end of the affidavit clause, the words, ———

"and that said corporation (*or* association) has no corporate seal" should be added.

The signatures and title of the officer taking the acknowledgment should be added.

Form 87.

Form of Authentication.

The authentication of the proof of acknowledgment of a deed or other written instrument when taken without the state and within any other state, territory, or district of the United States, or any form substantially in compliance with the above, may be in the following form:

[Venue.]

I, ———, clerk of the ——— court in and for said county, which court is a court of record, having a seal, (*or*, I, ———, the secretary of state of such state or territory), do hereby certify that ——— by and before me whom the foregoing acknowledgment (*or* proof) was taken, was, at the time of taking the same, a notary public, (*or* other officer) residing (*or* authorized to act) in said county, and was duly authorized by the laws of said state (territory, or district) to take and certify acknowledgments or

proofs of deeds of land in said state (territory, or district), and further that I am well acquainted with the handwriting of said ———, and that I verily believe that the signature to said certificate of acknowledgment (*or* proof) is genuine. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court (*or* state) this ——— day of ———, 19—.

Form 88.

NEW YORK: *General Form.*

On this ——— day of ———, 19—, before me personally appeared ——— and ———, to me known to be the persons described in the foregoing instrument, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

Form 89.

By Husband and Wife.

On this ——— day of ———, in the year 19—, before me personally came ———, and ———, his wife, to me known to be the individuals described in and who executed the within conveyance, and severally acknowledged that they executed the same for the purposes therein mentioned.

Form 90.

By Corporation.

On the ——— day of ———, in the year ———, before me personally came ———, to me known, who, being by me duly sworn, did depose and say that he resided in ———; that he is the (*president or other officer*) of the (*name of corporation*), the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.[1]

[1] The acknowledgment of a conveyance or other instrument by a corporation is required to be made by some officer authorized to execute the same by the board of directors of said corporation. If such corporation possesses no seal, that fact must be stated in place of the statements respecting the seal. 3 R. S. 1901 (Birdseye), p. 3070.

Form 91.

By a Corporation.

On this ——— day of ———, A. D. 19—, before me personally appeared ———, president of the ——— Company, to me known, who, being by me duly sworn, did depose and say that he resides in the city of ———, county of ———, and state of ———; that he knows the corporate seal of the ——— Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of its board of directors, and that by like order he signed the same as president. And on the same day and year before me personally appeared ———, secretary of the said company, to me known, who, being by me duly sworn, did depose and say that he resides in the city of ———, county of ———, and state of ———; that he knows the corporate seal of the ———Company; that the seal affixed to the foregoing instrument is the corporate seal of said company, and was so affixed by order of its board of directors, and that by like order he attested the same as secretary.

Form 92.

NORTH CAROLINA.

By Grantor.

I, ——— (*here give the name of the official and his title*), do hereby certify that ——— (*here give name of the grantor*), personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official seal this ——— day of ———[1].

Form 93.

Certificate for Husband and Wife.

I, ——— (*here give name of officer, as the case may be*), do hereby certify that ——— (*here give name of grantors*) personally appeared before me this day, and acknowledged the due execution of the foregoing (*or* annexed) deed of convyance (*or* other instrument); and the said ——— (*here give wife's name*) wife of said (*here give husband's name*) being by me privately examined, separate and apart from her husband, touching her

[1] Revisal 1908, § 1002.

voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto. Witness my hand and seal (*private or official, as the case may be*) this ——— day of ———, A. D. 19—.[1]

Form 94.

North Dakota.

Forms of Acknowledgments.

General Form to be Substantially Followed.

On this ——— day of ———, in the year ———, before me personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person who described in and who executed the within instrument, and acknowledged to me that he (*or* they) executed the same.

Form 95.

By Corporation.

On this ——— day of ———, in the year ———, before me (*here insert the name and quality of the officer*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the president (*or* the secretary) of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.

[1] If the proof or acknowledgment be taken by a justice of the peace, the clerk of a court of record shall certify as follows:

The foregoing (*or* annexed) certificate of ———, a justice of the peace of ——— County, is adjudged to be correct. Let the deed (*or other instrument*), with the certificates, be registered.

If the proof or acknowledgment be taken out of the county where the land is situate, or out of the state, the clerk of the superior court, if within the state, or the clerk of the court of record in the county and state in which the person taking the acknowledgment resides, shall certify as follows:

I hereby certify that ——— (*insert the name of the officer taking the proofs, etc.*) was, at the time of signing the foregoing certificate, a justice of the peace in and for the county of ——— and state of ———, and that his signature thereto is in his own proper handwriting. In witness whereof I hereunto set my hand and seal of office this ——— day of ———, 19—.

Form 96.

By Attorney in Fact.

On this ——— day of ———, in the year ———, before me (*here insert the name and quality of the officer*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person who is described in and whose name is subscribed to the within instrument at the attorney in fact of ———, and acknowledged to me that he subscribed the name of ——— thereto as principal, and his own name as attorney in fact.

Form 97.

By Deputy Sheriff.

On this ——— day of ———, in the year ———, before me, a ——— in and for said county, personally appeared ———, known to me to be the person who is described in, and whose name is subscribed to, the within instrument as deputy sheriff of said county, and acknowledged to me that he subscribed the name of ——— thereto as sheriff of said county, and his own name as deputy sheriff.[1]

Form 98.

OHIO.

General Form.

On this ——— day of ———, A. D. 19—, before me (*name and title*), in and for said county, personally appeared ———, the grantor within named, and acknowledged the execution of the foregoing instrument to be his voluntary act and deed for the uses and purposes therein mentioned. In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last above written.

Form 99.

By a Corporation.

Before the subscriber, a ——— within and for said county, personally came ———, who is the president of the said ———

[1] R. Codes 1905, § 3584.

Company, and acknowledged that the name of said company was subscribed to the foregoing indenture by himself as the president thereof, and that the seal affixed thereto is the seal of said company, and that said name was subscribed and said seal attached to the foregoing indenture by the direction and authority of said company, and that the foregoing indenture is the act and deed of the said ——— Company for the uses and purposes therein mentioned.

See Bates R. S., §§ 4106, 4107.

Form 100.

General Form of Acknowledgment.

Before me, ——— a ——— in and for said county and state, on this ——— day of ———, 19—, personally appeared ——— and ———, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.[1]

My commission expires ———.

Gen. Stats. 1908, § 5417.

Form 101.

By a Corporation.

Before me, a ——— in and for said county and state, on this ——— day of ———, 19—, personally appeared ———, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its (attorney in fact, president, vice-president, or mayor, *as the case may be*), and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Form 102.

OREGON.

Husband and Wife Within the State.

This certifies that on this ——— day of ———, A. D. 19—, before me, the undersigned (*here insert name and title*), in and for said county and state, personally appeared the within named ———, and ———, his wife, to me personally known to be (*or* satisfactorily proven to me on oath to be) the identical individ-

uals described in, and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein expressed.

Form 103.

Acknowledgment by Corporation.

On this ——— day of ———, 19—, before me appeared ——— and ———, both to me personally known, who being duly sworn, did say that he, the said ———, is the president, and he, the said ———, is the ——— secretary of ———, the within named corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said ——— and ——— acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate, written.

———————————————,

Form 104.

Acknowledgment, Within the State, by Attorney.

Before the undersigned, a justice of the peace for the precinct of ———, in the county and state aforesaid, appeared the within (*or* above) named ———, by his attorney in fact, within (*or* above) named ———, to me known to be the individual described in and who executed the within (*or* above) conveyance for and on behalf of the said ———, and acknowledged that he executed the same, this ——— day of ———, 19—.

See Gen. Laws 1907, c. 170: 2 Ann. Code and Stats., §§ 2926.

Form 105.

PENNSYLVANIA.

Certificate of Acknowledgment.

By an act approved April 1, 1909, it is provided that a certificate of acknowledgment of individuals (single or married) may be in the following form:

STATE OF PENNSYLVANIA, COUNTY OF ———, SS:

On this ——— day of ———, A. D. 19—, before me, came the

above named ——— and acknowledged the foregoing deed to be — act and deed, and desired the same to be recorded as such.

Witness my hand — seal, the day and year aforesaid.

(Seal.) ———,

(*Official character.*)

My commission expires ———.

Form 106

Acknowledgment by a Corporation.

Shall be in substantially the following form:

I hereby certify that on this ——— day of ———, in the year of our Lord 19—, before me, the subscriber (*title of the officer*), personally appeared ———, the attorney named in the foregoing (*instrument*) and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said (*instrument*) to be the act of the said (*corporation's name*).

Witness my hand and ——— seal the day and year aforesaid.

A corporation may acknowledge any deed, conveyance, mortgage or other instrument of writing *by an attorney* appointed by such corporation, and such appointment may be embodied in such deed, conveyance, mortgage or other instrument in substantially the following form:

The (corporation) doth hereby constitute and appoint ——— to be its attorney for it, and in its name and as for its corporate act and deed to acknowledge this (name of instrument) before any person having authority by the laws of the commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded. I Purdon's Digest 1905, p. 1155.

Form. 107.

Rhode Island.

Form for Husband and Wife.

On this ——— day of ———, in the year ———, before me personally appeared ———, and ———, his wife, both known to me, and known by me to be the persons executing the foregoing instrument, and they acknowledged the said instrument to be their free act and deed. In witness whereof I have set my hand and seal at ———, the day and year above written.

G. L. 1896, §§ 6, 79.

Form 108.

SOUTH CAROLINA.

Affidavit of Subscribing Witness.

Personally appeared before me ———, and made oath that he saw ——— sign, seal, and deliver the within conveyance for the uses and purposes therein mentioned, and that he with ———, in the presence of each other, witnessed the due execution thereof. (*Signed.*) Sworn to before me the ——— day of ———, A. D. 19—.

Form 109.

Renunciation of Dower by Wife.

I (*name and title*) do hereby certify unto all whom it may concern that ———, the wife of the within named ———, did this day appear before me, and, upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within named ———, his heirs and assigns, all her interest and estate, and also all her right and claim of dower of, in, or to all and singular the premises within mentioned and released. (*Signature of wife.*) Given under my hand and seal this ——— day of ———, A. D. 19—.

Form 110.

SOUTH DAKOTA.

General Form of Acknowledgment.[1]

On this ——— day of ———, in the year ———, before me personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person who is described in, and who executed the within instrument, and acknowledged to me that he (*or* they) executed the same.

Form 111.

By Corporation.

On this ——— day of ———, in the year———, before me

[1] Comp. Laws of Dakota 1908, Civ. Code, § 981.

(*here insert the name and quality of the officer*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the president (*or* the secretary) of the corporation that is described in, and that executed, the within instrument, and acknowledged to me that such corporation executed the same.

Form 112.

By Attorney in Fact.

On this ——— day of ———, in the year ———, before me (*here insert the name and quality of the officer*) personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person who is described in, and whose name is subscribed to, the within instrument as the attorney in fact of ———, and acknowledged to me that he subscribed the name of ———thereto as principal, and his own name as attorney in fact.

Form 113.

TENNESSEE.

General Form.[1]

Personally appeared before me (*name and title*), the within named bargainor (*or* other name), with whom I am personally acquainted, and who acknowledged that he executed the within deed (*or* other instrument) for the purpose therein contained. Witness my hand and seal of office this ——— day of ———, A. D. 19—.

Form 114.

Wife's Acknowledgment, Annexed to Foregoing.

And ———, wife of the said ———, having appeared before me privily and apart from her husband, the said ———, acknowledged the execution of the said deed to have been done by her freely, voluntarily, and understandingly, without compulsion or constraint from her said husband, and for the purposes therein expressed.

[1] Code 1896, § 3717.

Form 115.

By a Corporation.

Before me, the state and county aforesaid, personally appeared ———, with whom I am personally acquainted, and who, upon oath, acknowledged himself to be the president (*or* other officer authorized to execute the instrument) of the ———, the within named bargainor, a corporation, and that he as such ———, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himslf as ———. Witness my hand and seal, at office in ———, this ——— day of ———.

See Code 1896, §§ 3713–3716.

Form 116.

Texas.

General Form.

Before me, ——— (*name and character of officer*), on this day personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed. Given under my hand and seal of office this ——— day of ———, A. D. ———.

Form 117.

Acknowledgment of Married Woman.

Before me, ——— (*name and character of officer*), on this day personally appeared ———, wife of ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said ———, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it. Given under my hand and seal of office this ——— day of ———, A. D. ———.

Form 118.

Proof of Subscribing Witness.

Before me, ——— (*name and character of officer*), this day personally appeared ———, known to me (*or* proved to me on the oath of ———) to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and, after being duly sworn by me, stated on oath that he saw ———, the grantor (*or* person who executed the foregoing instrument), subscribe the same (*or* that the grantor or person who executed such instrument of writing acknowledged in his presence that he had executed the same for the purposes and consideration expressed), and that he had signed the same as a witness at the request of the grantor (*or person who executed the same*). Given under my hand and seal of office this ——— day of ———, A. D.

See R. S. 1895, arts. 4613–4615.

UTAH.

Form 119.

General Form.

On this ——— day of ———, A. D. 19—, ——— personally appeared before me (*name and official title*), the signer of the above instrument, who duly acknowledged to me that he executed the same.

Form 120.

By a Corporation.[1]

On the ——— day of ———, A. D. ———, personally appeared before me A. B., who, being by me duly sworn (*or* affirmed), did say that he is the president (*or other officer or agent, as the case may be*) of (*naming the corporation*), and that said instrument was signed in behalf of said corporation by authority of its bylaws (*or* by resolution of its board of directors, *as the case may be*), and said A. B. acknowledged to me that said corporation executed the same.

[1] Comp. Laws 1907, § 1989.

Form 121.

Grantor Known to the Officer.

On this ——— day of ———, A. D. 19—, personally appeared before me ——— (*name and official title*), the signer of the above instrument, who duly acknowledged to me that he executed the same.

Form 122.

Grantor Unknown.

On this ——— day of ———, A. D. 19—, personally appeared before me ———, satisfactorily proved to me to be the signer of the above instrument, by the oath of ———, a competent and credible witness for that purpose by me duly sworn, and he, the said ———, acknowledged that he executed the same. In witness, etc.

Form 123.

Proof by Subscribing Witness.

On this ——— day of ———, A. D. 19—, before me (***name and official title***) personally appeared ———, personally known to me (*or* satisfactorily proved to me by the oath of ———, a competent and credible witness for that purpose by me duly sworn) to be the same person whose name is subscribed to the above instrument as a witness thereto, who, being by me duly sworn, deposes and says that he resides in ———, county of ———, and state of Utah; that he was present and saw ———, personally known to him to be the signer of the above instrument as a party thereto, sign and deliver the same, and heard him acknowledge that he executed the same; and that he, the deponent, thereupon signed his name as a subscribing witness thereto, at the request of the said ———. In witness whereof, etc.

Form 124.

VERMONT.

Form for Husband and Wife.

At ———, this ——— day of ———, 19—, personally appeared ———, and ———, his wife, the signers and sealers of the above

written instrument, and acknowledged the same to be their free act and deed.

Form 125.

VIRGINIA.

General Form.

I (*name and official title*) do certify that ———, whose name is signed to the writing above or hereto annexed, bearing date the ——— day of ———, 19—, has acknowledged the same before me in my county and state aforesaid. Given under my hand (*and official seal*) this ——— day of ———, A. D. 19—.

For a Commissioner Appointed by the Governor of Virginia.

I, ———, a commissioner appointed by the governor of the state of Virginia for the said state (*or territory or district*) of ———, certify that E. F., whose name is signed to the writing above (or hereto annexed), bearing date on the ——— day of ———, has acknowledged the same before me in my state (or territory or district) aforesaid. Given under my hand this ——— day of ———.

Form 126.

Person Acting in Behalf of a Person or Corporation.

I, ———, a ——— (*here insert the official title of the person certifying the acknowledgment*) in and for the state and county aforesaid, do certify that ——— (*here insert the name or names of the persons signing the writing on behalf of the person or corporation, or the name of the person signing the writing in a representative capacity*) has acknowledged the same before me in my county aforesaid. Given under my hand this ——— day of ———.[1]

Form 127.

WASHINGTON.

Form for Husband and Wife.[2]

I (*name and title*) do hereby certify that on this ——— day of

[1] Supp. Code 1898, § 2501. [2] Laws 1885-86, p. 179.

———, 19—, personally appeared before me ——— (*name of grantor*), and ———, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned. Given under my hand and official seal this ——— day of ———, A. D. 19—.

Form 128.

By a Corporation.

On this ——— day of ———, 19—, before me personally appeared ———, to me known to be president (*vice-president, secretary, treasurer, or other authorized officer or agent*) of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

(*Signature and title of, officer.*)

Form 129.

Release of Homestead in Mortgage by a Married Woman.

Be it remembered that on this ——— day of ———, A. D. 19—, before me, the undersigned authority, personally came ———, and ———, his wife, who are personally known to me to be the same persons who are named within, and who executed the foregoing mortgage deed, and severally acknowledged to me that they executed the same freely, for the uses and purposes therein set forth. And I certify that I did examine the said ——— separate and apart from her husband, and that I did, in the said examination, make known to her the contents of the said mortgage deed, and fully apprise her of her rights of homestead under the laws of this state, and of the effect of signing the said mortgage, and she thereupon then and there acknowledged to me that she executed the same voluntarily of her own free will, and without any fear of or coercion from her husband. In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

Form 130.

WEST VIRGINIA.

General Form.[1]

I (*name and title*) do certify that ———, whose name is signed to the writing above (*or* hereto annexed), bearing date on the ——— day of ———, has this day acknowledged the same before me in my said county and state. Given under my hand and seal this ——— day of ———, 19—.

Form 131.

By Husband and Wife.[2]

I (*name and title*) do hereby certify that ———, and ———, his wife, whose names are signed to the writing above (*or* hereto annexed), bearing date the ——— day of ———, 19—, have this day acknowledged the same before me in my said ———. Given under my hand this ——— day of ———, 19—.

Form 132.

By Married Woman Separate from her Husband.

I (*name and title*) do certify that ———, the wife of ———, whose names are signed to the writing above (*or* hereto annexed), bearing date the ——— day of ———, 19—, has this day acknowledged the same before me in my said ———. Given under my hand, this ——— day of ———, 19—.

Form 133.

By Married Woman living apart from her Husband, or in case her Husband is non compos mentis.

The certificate may be as in the form last given with a further certificate in the following form and effect:

I further certify that, before taking said acknowledgment, it was proved to my satisfaction that the real estate in said writing mentioned was the sole and separate property of said ———, and

[1] Code 1891, c. 73, §§ 3, 4.
[2] Code 1906, c. 73, § 3079.

that she was at the date of said writing, and now is, living separate and apart from her husband (*or* that her husband is non compos mentis).

Form 134.

By a Corporation.

I (*name and title*) do certify that ——— personally appeared before me in my said ———, and being by me duly sworn (*or* affirmed), did depose and say that he is the president (or other officer or agent) of the corporation (or association) described in the writing above (or hereto annexed), bearing date the ——— day of ———, 19—, authorized by said corporation (or association) to execute and acknowledge deeds and other writings of such corporation (or association), and that the seal affixed to said writing is the corporate seal of said corporation (or the seal of said association as the case may be), and that said writing was signed and sealed by him in behalf of said corporation (or association) by its authority duly given. And the said ——— acknowledged the said writing to be the act and deed of said corporation (or association).

Form 135.

WISCONSIN.

By Husband and Wife.

Personally came before me this ——— day of ———, 19—, the above (*or* within) named ———, and ———, his wife (*or, if an officer, adding the name of his office*), to me known to be the persons who executed the foregoing (*or* within) instrument. and acknowledged the same.

Form 136.

WYOMING:

By Husband and Wife.

General Form.[1]

I (*name and official title*) do hereby certify that (*name of the grantor, and, if acknowledged by wife, her name, and add "his wife"*), personally known to me to be the same person whose name is (*or* are) subscribed to the foregoing instrument, appeared before me on this day in person, and acknowledged that he (she *or* they) signed, sealed, and delivered the said instrument as his (her *or* their) free and voluntary act, for the uses and purposes therein set forth. Given under my hand and seal, this (*day of the month*) day of (*month*), A. D. (*year*).

[1] Code 1906, c. 73, § 3079.

CHAPTER II.

DEEDS, COVENANTS, RESERVATIONS, RESTRICTIONS, RIGHT OF WAY, EASEMENTS, ETC.

F. 137. Deed of bargain and sale.
138. Warranty deed.
139. Warranty deed. Another form.
140. Warranty deed with full covenants, short form.
141. Another form of warranty deed. Exemption of homestead under statute.
142. Special warranty. Covenants against grantor.
143. Covenant of seizin, free from incumbrances and good right to convey.
144. Covenant against incumbrances.
145. Covenant for quiet enjoyment.
146. Covenant for further assurance.
147. General covenant of warranty.
148. Deed of partition.
149. Deed of grant.
150. Deed of gift.
151. Quitclaim deed.
152. Sheriff's deed under execution.
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154. Trustee's or mortgagee's deed on foreclosure. Another form.
155. Commissioner's deed under foreclosure.
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191. Trustee's deed under power in will.
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211. Deed by tenants in common or joint tenants.
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219. Agreement between householder and adjoining land owner as to a right to eaves drop.
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221. Grant of right of way to an interurban railway company.
222. Grant of right of sewage.
223. Grant of right to erect telephone poles.
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226. Deed giving right to use sewers.
227. Reserving to grantor right to lay down sewer pipes.
228. Common drain and cesspool.
F. 229. Restriction of buildings to private or professional residence.
230. Only one dwelling house to be erected.
231. Building to be erected by grantee.
232. Erection of temporary buildings prohibited.
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234. No offensive business to be carried on.
235. Another form. No offensive trade to be carried on.
236. Sale of intoxicating liquors prohibited.
237. Building lines to be observed.
238. Windows not to overlook.
239. Buildings to be placed back from street.
240. Houses to be erected at certain cost.
241. Only one house to be erected.
242. Grantee to fence land.
243. Sand or gravel not to be dug.
244. Deed giving grantor right to waive or alter restrictions.
245. Infant grantor to convey on reaching majority.
246. Division walls shall be party-walls.
247. Party-walls conveyed by undivided moieties.
248. Release of easement by indorsement.

Form 137.

Deed of Bargain and Sale.

This indenture, made this ——— day of ——— A. D. 19—, be-

tween ———, the part ——— of the first part, and ———, the part ——— of the second part,

Witnesseth: That the said part ——— of the first part, for and in consideration of the sum of ——— dollars, ——— of the United States of America, to ——— in hand paid by the said part ——— of the second part, the receipt whereof is hereby acknowledged, ha— granted, bargained and sold, conveyed and confirmed, and by these presents do ——— grant, bargain and sell, convey and confirm, unto the said part ——— of the second part, and to ——— heirs and assigns forever, all th— certain lot ———, piece— or parcel— of land situate, lying and being in the ———County of ———, State of ———, and bounded and particularly described as follows, to wit:

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the revision and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said part ——— of the second part, and to ——— heirs and assigns forever,

In witness whereof, etc.

Form 138.

Warranty Deed.

This indenture, made the ——— day of ——— in the year of our Lord one thousand eight hundred and eighty- ——— between ——— the part ——— of the first part, and ——— part ——— of the second part, witnesseth: That the said part——— of the first part, for and in consideration of the sum of ——— dollars, ——— of the United States of America, to ——— in hand paid by the said part ——— of the second part, the receipt whereof is hereby acknowledged, do ——— by these presents grant, bargain, sell, convey and confirm, unto the said part ——— of the second part, and to ——— heirs and assigns forever, all th— certain lot—, piece— or parcel— of land, situate, lying and being in the ——— County of ———, State of ———, and bounded and particularly described as follows, to wit:

Together with the tenements, heriditaments and appurtenances thereto belonging, or in anywise appertaining; and also all——— estate, right, title and interest, at law and equity therein or thereto, including ———

To have and to hold the same to the said ——— heirs and assigns forever; and ——— do covenant with the said ——— and

———legal representatives forever, that the said real estate is free from all incumbrances, and that ——— will and ——— heirs, executors and administrators, shall Warrant and Defend the same to the said ——— heirs and assigns forever, against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said part ——— of the first part ha— hereunto set ——— hand— and seal— the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 139.

Warranty Deed. Another Form.

This indenture, made this ——— day of ——— between A. B. of the ——— of ———, in the County of ——— and State of ———, (and C. B., his wife) of the first part, and E. F., of ———, of the second part, witnesseth: That the said party (*or* parties) of the first part, for and in consideration of the sum of ——— dollars, to him (*or,* them) in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part, his executors and administrators, forever released and discharged from the same, by these presents, has (*or* have) granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents, does (*or,* do) grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to his heirs and assigns forever, all the following tract, lot, piece, or parcel of land, situated in the ——— of ———, in the county of ——— and state of ———, to wit:

(insert description)

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and, also, all the estate, right, title, interest, dower and dowers, property, possession, claim and demand whatsoever, both at law and in equity, of the said party (*or,* parties) of the first part of, in and to the above granted premises and every part and parcel thereof, with the appurtenances, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state (*or,* and the said part of the first part, hereby expressly waive— release and relinquish—, unto the said party of the second part, ——— heirs, executors, administrators and assigns, all right, title, claim, interest and benefit, whatsoever, in and to the above described premises,

and each and every part thereof, which is given by or results from all laws of this state pertaining to the exemption of homesteads).

And the said ———, party of the first part, for ——— heirs, executors, and administrators, do ——— covenant, grant, bargain and agree, to and with the said party of the second part, ——— heirs and assigns, that at the time of the ensealing and delivery of these presents, ——— well seized of the premises above conveyed, as of a good, sure, perfect, absolute and indefeasible estate and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances, of what kind or nature soever, and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, ——— heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In testimony whereof, etc.

Signed, sealed and delivered
in the presence of

Form 140.

Warranty Deed, With Full Covenants. Short Form.

Know all men, by these presents, that A. B., of ———, in the county of ——— and state of ——— (and C. B., his wife), of the first part, for and in consideration of ——— dollars to him (*or,* them) paid by E. F., of ———, the receipt whereof is hereby acknowledged, do grant, bargain, sell and confirm unto the said E. F., his heirs and assigns, forever, all that lot, piece or parcel of land situate, lying and being in the county of ———, and state of ———, described as follows:

(insert description)

With the appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and, also, all the estate, right, title and interest, dower and right of dower, possession, claim and demand whatsoever, both at law and in equity, of the said party (*or,* parties) of the first part of, in and to the above granted premises and every part and parcel thereof, with the appurtenances (hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state.)

And the said A. B. does, for himself, his heirs, executors and administrators, covenant with the said E. F., his heirs and assigns, that, at the time of making this conveyance, he is well seized of

the premises, as of a good and indefeasible estate in fee simple, and has good right to bargain and sell the same, as aforesaid, and that the same are free from all incumbrances whatsoever; and the above granted premises, in the quiet and peaceable possession of the said E. F., and his heirs and assigns, he will warrant and forever defend.

In witness whereof, etc.

Signed, sealed and delivered
in the presence of

Form 141.

Another Form of Warranty Deed. Exemption of Homestead Under Statute.

This indenture, made this ——— day of ——— in the year one thousand nine hundred and ———, between A. B. of ———, and S. B., his wife, parties of the first part, and ———, of ———, part— of the second part, witnesseth:

That the said part— of the first part, for and in consideration of the sum of ——— dollars, in hand, paid by the said part— of the second part, the receipt whereof is hereby acknowledged, and the said part— of the second part forever released and discharged therefrom, ha— granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien and confirm, unto the said part— of the second part, and to ——— heirs and assigns forever, all the following described lot—, piece or parcel of land, situate in the county of ——— and state of ——— and known and described as follows, to-wit:

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim or demand whatsoever, of the said part— of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances, to have and to hold the said premises above bargained and described, with the appurtenances, unto the said part of the second part, ——— heirs and assigns, forever.

And the said ———, part— of the first part, for ——— heirs, executors, and administrators, do ——— covenant, grant, bargain and agree, to and with the said part ——— of the second part, ——— heirs and assigns, that at the time of the ensealing and delivery of these presents, ——— well seized of the premises above conveyed, as of a good, sure, perfect, absolute and inde-

feasible estate of inheritance in law, in fee simple; and ha— good right, full power and lawful authority to grant, bargain, sell and convey the same, in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind and nature soever; and the above bargained premises, in the quiet and peaceable possession of the said part— of the second part, ——— heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said part— of the first part shall and will warrant and forever defend.

And the said ———, part— of the first part, hereby expressly waive— and release— any and all right, benefit, privilege, advantage and exemption under or by virtue of any and all statutes of the state of Illinois providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled "an act to amend an act entitled 'an act to exempt the homestead from forced sale'" etc., passed by the general assembly of the State of ———, approved ————————, as amended by an act approved ————————.

In witness whereof, etc.

Signed, sealed and delivered
in the presence of

Form 142.

Special Warranty: Covenants Against Grantor.

This indenture, etc.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part— of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances, to have and to hold, all and singular, the above-mentioned and described premises, together with the appurtenances, unto the said part— of the second part, ——— heirs and assigns forever.

And the said ———, part— of the first part, hereby expressly waive—, release— and relinquish— unto the said part— of the second part, ——— heirs, executors, administrators and assigns, all right, title, claim, interest and benefit whatever, in and to the above described premises, and each and every part thereof, which is given by or results from all laws of this state pertaining to the exemption of homesteads.

And the said A. B. for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said part— of the second part, ——— heirs and assigns, that the part— of the first part ha— not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above-mentioned and described premises or any part or parcel thereof, now are or at any time, hereafter shall or may be impeached, charged, or incumbered in any manner of way whatsoever (*or,* and the said A. B., for himself, his heirs, executors and administrators, does hereby covenant, promise and agree to and with the said part— of the second part, ——— heirs and assigns, that the said premises, against the claim of all persons claiming or to claim by, through or under him only, he will forever warrant and defend.

In testimony whereof, etc.

Signed, sealed and delivered
in the presence of

Form 143.

Covenant of Seizin, Free from Incumbrance and of Good Right to Convey.

And I, the said A. B., for myself, and my heirs, executors and administrators, do covenant with the said C. D., his heirs and assigns, that I am lawfully seized in fee simple of the above granted premises; that they are free from all incumbrances; that I have a good right to sell and convey the same to the said C. D., his heirs and assigns, for ever, as aforesaid; and that I will, and my heirs, executors and administrators, shall warrant and defend the same to the said C. D., his heirs and assigns for ever, against the lawful claims and demands of all persons.

Form 144.

Covenant Against Incumbrance.

And the said A. B. and C. D., for themselves, their heirs, executors and administrators, do severally and not jointly, nor the one for the other or for the act or deed of the other, but each for his acts only, covenant, promise, grant and agree, to and with the said E. F., his heirs and assigns, by these presents, that they, the said A. B. and C. D., have not heretofore done, committed or willingly suffered to be done or committed, any act, matter or thing whatever, whereby the premises hereby granted, or any part thereof, are or shall be charged or incumbered in title, estate or otherwise.

Form 145.

Covenant for Quiet Enjoyment.

And, also, that he, the said party of the second part, his heirs and assigns and every of them, shall and may, from time to time and at all times, forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular, the premises hereinbefore mentioned, or intended to be hereby conveyed, and every part and parcel thereof, with their and every of their appurtenances, without any let, suit, trouble, denial, eviction, ejection or interruption whatsoever of or by him, the said A. B., his heirs or assigns, or at or by any other person or persons, whatsoever, having or lawfully claiming any estate, right, title or interest of, in or to the same or any part thereof and that, free and clear and freely and clearly acquitted, exonerated and discharged of and from all and all manner of former and other bargains, sales, annuities, debts, duties, judgments, executions, recognizances and all other estates, rights, titles, charges and incumbrances whatsoever had, made, committed, done or suffered, or to be had, made, committed, done or suffered, in any wise whatsoever, by him the said A. B., or by any other person or persons whatsoever having, or lawfully claiming any estate, right, title or interest of, in or to the same or any part or parcel thereof.

Form 146.

Covenant for Further Assurance.

And, moreover, that he, the said A. B., and his heirs and all and every other person or persons having, or lawfully claiming, any estate, right, title or interest of, in and to the said dwelling house, lot of ground and premises, or any part or parcel thereof, by, from or under him shall and will, from time to time and at all times hereafter, upon the reasonable request and at the proper costs and charges of the said party of the second part, his heirs or assigns, make, do, acknowledge, suffer and execute, or cause and procure to be made, done, acknowledged, suffered and executed all and every such further and other act and acts, thing and things, conveyances and assurances in the law, whatsoever, for the further, better and more effectual conveying, settling and assuring of, all and singular, the premises hereinbefore mentioned or intended to be herein conveyed, with their and every of their rights, members and appurtenances, to the only proper use and behoof of the said party of the second part, his heirs or assigns, forever, as by the said party of the second part, his heirs or

assigns, or his or their counsel, learned in the law, may be reasonably devised, advised or required.

Form 147.

General Covenant of Warranty.

And the said A. B. and his heirs, all and singular, the aforesaid dwelling house, lot of ground and premises, with their and every of their rights, members and appurtenances, hereby granted and released and every part and parcel thereof, unto the said party of the second part, his heirs and assigns, and against him, the said A. B., his heirs and assigns, and against all and every other person or persons whomsoever, shall and will warrant and forever defend by these presents.

Form 148.

Deed of Partition.

This indenture, made the ——— day of ——— in the year of our Lord one thousand nine hundred and ——— between C. D., of ———, in the County of ———, and state of ———, of the first part, F. G., of ———, in the county of ——— and state of ———, of the second part, and H. I., of ———, in the county of ——— and state of ——— storekeeper, of the third part.

Whereas, the said parties hereto have and hold as joint tenants (*or,* as tenants in common), equally (*or,* the party of the first part two equal undivided eighths, the party of the second part one equal undivided eighth, and the party of the third part five equal undivided eighths of, *or as the fact is*), a certain tract, piece or parcel of land, situate in ——— in the county of ———, and state of ———, said lands being the same premises devised to the said parties hereto by the will of X. Y. (*or,* conveyed to them by X. Y. by indenture, bearing date the ——— day of ——— *or other description, according to the nature of the tenure of the said parties*). And whereas, the parties hereto have mutually agreed to make a partition of said land and to hold their respective shares in severalty.

Now, this indenture witnesseth:

First, the said C. D., party of the first part, shall from henceforth have, hold, possess and enjoy in severalty by himself and to him and his heirs and assigns, for his share and proportion of the said lands and premises, all (*here insert description of part allotted to him*), and the said parties of the second and third parts, in consideration of the premises (*and of the sum of ——— dollars to*

them paid by the party of the first part for equality of partition, the receipt whereof is hereby acknowledged), do hereby give, grant, set over, convey, release and confirm unto the said party of the first part, and to his heirs and assigns forever, the last above described premises together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also the estate, right, title and interest (*dower and right of dower to be inserted if a wife joins in the deed to bar her dower as to this allotment*), property, possession, claim and demand whatsoever of the said parties of the second and third parts, both in law and in equity, of, in and to the above granted premises, with the appurtenances and every part thereof, to have and to hold, all and singular, the above granted premises and every part thereof and the appurtenances thereto belonging, unto the said party of the first part, his heirs and assigns forever (*If the property be incumbered,* and subject to, etc., etc., *specifying the incumbrance.*)

And the said parties of the second and third parts do hereby, severally and not jointly, but each for himself, and for his heirs, executors and administrators, covenant, promise and agree, to and with the said party of the first part, that he, the said party of the first part, his heirs and assigns, shall or lawfully may, from time to time and at all times hereafter forever freely, peaceably and quietly have, hold, occupy, possess and enjoy the said first described piece or allotment of land, with the appurtenances, and recover and take the rents, issues and profits thereof, without any molestation, interruption or denial of them the parties of the second and third parts, their heirs or assigns, or of any other person or persons whatsoever, lawfully claiming or to claim by, from or under them, or either of them.

Second. The said F. G., party of the second part, shall from henceforth have, hold, possess and enjoy in severalty by himself, and to him and his heirs and assigns, for his share and proportion of the said lands and premises, all (*here insert description of the part allotted to him*). And the said parties of the first and third parts do hereby give, grant, set over, convey and lease and confirm unto the said F. G., the party of the second part, his heirs and assigns forever, the last above described premises, together with the appurtenances (*etc., as above, and so on with the allotment to the party of the third part*).

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 149.

Deed of Grant.

For and in consideration of the sum of ——— to ——— in hand paid ——— do hereby grant, bargain and sell unto ——— all that real property situated in the ——— county of ——— state of ——— bounded and described as follows:

Witness ——— hand— and seal—, this ——— day of ——— 19—.

Signed, sealed and delivered in the presence of

Form 150.

Deed of Gift.

This indenture, made the ——— day of ——— A. D. 19— between ——— the part— of the first part, and ——— the part— of the second part, witnesseth: That the said part— of the first part, for and in consideration of the love and affection which the said part— of the first part ha— and bear— unto the said part— of the second part, as also for the better maintenance, support, protection and livelihood of the said part— of the second part, do— by these presents give, grant, alien and confirm, unto the said part— of the second part, and to ——— heirs and assigns forever, all th— certain lot—, piece— or parcel— of land, situate, lying and being in the ——— county of ———, state of ——— and bounded and described as follows, to wit: together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said part— of the second part, ——— heirs and assigns forever

In witness whereof, the said part— of the first part ha— hereunto set ——— hand— and seal—, the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 151.

Quitclaim Deed.

This indenture, made the ——— day of ——— A. D. 190— between ——— the part— of the first part, and ——— the part—

of the second part, witnesseth: That the said part— of the first part, for and in consideration of the sum of ——— dollars, ——— of the United States of America, to ——— in hand paid by the said part— of the second part, the receipt whereof is hereby acknowledged, HA ——— remised, released and forever quitclaimed, and by these presents DO—remise, release, and forever quitclaim, unto the said part— of the second part, and to ——— heirs and assigns, all th— certain lot—, piece— or parcel— of land, situate, lying and being in the ——— county of ——— state of ———, and bounded and particularly described as follows, to wit:

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, ——— property, possession, claim and demand whatsoever, as well in law as in equity, of the said part— of the first part of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the said premises, together with the appurtenances, unto the said part— of the second part, and to ——— heirs and assigns forever

In witness whereof, the said part— of the first part ha— hereunto set ——— hand — and seal—, the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 152.

Sheriff's Deed Under Execution.

This indenture, made the ——— day of ——— in the year of our Lord one thousand eight hundred and ——— between ———, Sheriff of the —— county of———, state of ——— the party of the first part, and ——— of said ——— county of ———, the part— of the second part,

Whereas, by virtue of a Writ of Execution issued out of and under the seal of the Superior Court of the ——— county of ———, state of ———, tested the ——— day of ——— A. D. 19—, upon a judgment recovered in said court, on the ——— day of ——— A. D. 19—, in favor of ——— and against ——— to the said sheriff directed and delivered, commanding him, that out of the personal property of said judgment debtor— in this ——— county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judg-

ment debtor— could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor— on the ——— day of ——— A. D. 19—, or at any time afterwards;

And whereas, because sufficient personal property of the said judgment debtor— could not be found, whereof the said sheriff could cause to be made the moneys specified in said writ, the said sheriff did, in obedience to said command, levy on, take and seize all the right, title, interest and claim which the said judgment debtor— so had to the lands, tenements, real estate, and premises hereinafter particularly set forth and described, with the appurtenances and did, on the ——— day of ——— A. D. 19—, sell all the right, title, interest and claim of the said judgment debtor— in and to the said premises, at public auction, in front of the ——— in the ——— of ——— in said ——— county of ———, between the hours of nine in the morning and five in the afternoon of that day, namely, at ——— o'clock ——— M., after having first given due notice of the time and place of such sale ——— according to law at which sale all the right, title, interest and claim of said judgment debtor—, in and to the said premises, were struck off and sold to the said part— of the second part, for the sum of ——— dollars, ——— of the United States of America, the said part— of the second part being the highest bidder—, and that being the highest sum bid for the same, whereupon the said sheriff, after receiving from the said purchaser— the said sum of money so bid as aforesaid, gave to the said part— of the second part such certificate of said sale as by law directed to be given, and a duplicate of such certificate was duly filed by the said sheriff in the office of the recorder of the ——— county of ———;

And whereas, six months after said sale have expired without any redemption of the said premises having been made;

Now, this indenture witnesseth: That the said ——— the sheriff aforesaid, by virtue of the said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the said sum of money, to him in hand paid as aforesaid, by the said part— of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said part— of the second part, and to ——— heirs and assigns forever, all the right, title, interest and claim which the said judgment debtor ——— had on the said ——— day of ———, A. D. 19—, or at any time afterwards, or now ha—, in and to all th— certain lot—, piece— or parcel— of land situate, lying, and being in the said ——— county of ———, State of ———, and bounded and particulalry described as follows, to wit:—together with all and singular the hereditaments

and appurtenances thereunto belonging, or in anywise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said part— of the second part, ——— heirs and assigns forever, as fully and absolutely as the said sheriff can, may, or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same.

In witness whereof, the sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered
in the presence of

Sheriff of the ——— county of———
State of———

Form 153.

Trustee's Deed on Foreclosure.

This indenture, made the ——— day of ——— in the year of our Lord one thousand nine hundred and ——— between ——— and ——— of ——— county of ———, state of ——— as trustees, parties of the first part, and ——— of ——— county of ———, state of ——— part— of the second part, witnesseth: whereas, on the ——— day of ———, 190—, ——— made, executed and delivered to ——— at ——— in said ———, certain promissory note—, payable to said ——— or order, for the sum of ——— payable ——— day of ———, 190—, bearing interest thereon from date until paid, both principal and interest payable in Gold Coin of the United States;

And, whereas, upon the same date, and for the purpose of securing the said promissory note— according to ——— tenor, the ——— granted, bargained, sold and conveyed unto the said ——— as trustees, and in joint tenancy, and to the survivor of them, their successors and assigns, those certain lots, pieces or parcels of land situate in the ——— county of ——— State of ———, and hereinafter particularly decribed, and the subject of these presents; and for that purpose made, executed and delivered to said trustees, a certain Deed of Trust, bearing date ———, 190—, which said deed of trust, with the acceptance of said trustees indorsed thereon, and duly acknowledged, was on the ——— day of ———, 190—, duly recorded in the office of the county recorder of ——— county of ———, state of ———, in liber ——— of ——— deeds, page ———, records, of said ——— county of ———:

And, whereas, said deed of trust provided that if default be made in the payment of said promissory, either principal or interest, when due, it should be lawful for said trustees, or the survivor of them their successors or assigns, to sell the said premises, or so much thereof as in their discretion they should find necessary to be sold, in order to accomplish the objects of the trusts in said trust deed provided, after first publishing a notice of the time and place of such sale, together with a description of the property to be sold, at least once a week for not less than ——— weeks, in some newspaper published in said ——— county of ———, state of ———, said sale to take place on the day so advertised, or any day to which said sale has been postponed, in any county where any of said property may be situated or in the ——— county of ———, said sale to be made to the highest bidder for cash, and that the holder of said promissory might purchase at such sale:

And, whereas, it was and is provided by the said deed of trust that upon such sale the said trustees, should execute, and after due payment made, deliver to the purchaser or purchasers a deed of grant, bargain and sale of the premises so sold, and out of the proceeds thereof should pay:

First, the expenses of such sale, together with reasonable expenses of the trust therein created, including counsel fees of ——— dollars, in gold coin, which should become due upon the default being made in the payments of any of the sums secured to be paid by said deed of trust;

Second, all of the indebtedness of the said ——— to said ——— or assigns, including also all sums which may have been advanced by the said ——— to them on account of any charge against said property, the payment of which was especially authorized by said deed of trust;

Third, the amount due and unpaid on said promissory note, both principal and interest; and

Lastly, the surplus, if any, to the said ——— his or ——— or assigns.

And, whereas, the said note became due, both principal and interest, and no payment was made thereon except ———

And, whereas, the said ——— the owner and holder of said promissory, made due application for the sale of said premises, in accordance with the terms of said deed of trust;

And, whereas, it was deemed necessary by said trustees to sell the ——— of said premises in order to accomplish the objects of said trusts;

And, whereas, the said trustees caused to be published in the ———a newspaper published ——— in the said ——— county of ———, and in each issue thereof, and at least one time a week

for ———, to wit: in the issues of said paper published on the ———, 190—, , a notice containing a description of the whole of said property, and stating therein that on the ——— day of ——— 190—, at the hour of ——— o'clock ———, at ——— in the ——— county of ——— state of ———, that the said trustees would sell the said property for cash in gold coin of the United States, to the highest bidder;

And, whereas, on the ——— day of ——— 190—, at the hour and place mentioned in said notice and above named, the said trustees exposed said property for sale at public auction to the highest cash bidder, for gold coin of the United States, and ——— the said second party bid the sum of ——— dollars, in gold coin of the United States, for said property, which said bid was the highest cash bid for gold coin made at said sale.

Now, therefore, by virtue of the authority vested in said trustees by and in the premises, and in pursuance of the provisions of the said deed of trust, and for and in the consideration of the sum of ———, gold coin of the United States, in hand paid to the said trustees by the said ———, the receipt whereof is hereby acknowledged, the said ——— and ———, as such trustees, parties of the first part, have granted, bargained and sold, and by these presents do grant, bargain and sell to the said ———, the part— of the second part, ——— and assigns, that certain real estate situate in the ——— county of ———, state of ———, particularly described as follows, to wit:

To have and to hold the same, together with the appurtenances, unto said second party ——— and assigns forever.

In witness whereof, the parties of the first part, as trustees as aforesaid, have subscribed their names the day and year first above written.

Signed, sealed and delivered
in presence of

Form 154.

Trustee's or Mortgagee's Deed on Foreclosure—Another Form.

This indenture, made this ——— day of ——— in the year of our Lord one thousand nine hundred and ——— between ——— trustee, of the ———county of ——— and state of ——— party of the first part, and ——— of the ——— county of ——— and state of ——— party of the second part, witnesseth: That whereas ——— of the county of ——— and state of ——— did, by a certain deed, dated the ——— day of ——— A. D. ——— which deed is recorded in the recorder's office of the county of ——— in the state of ——— on the ——— day of ——— A. D.

— in book ——— of ——— at page ——— convey to the said party of the first part all the premises hereinafter described, to secure the payment of ——— certain— in said deed particularly mentioned, and upon certain conditions (*or* trusts) in said deed particularly declared and prescribed; and whereas default hath been made in the payment of ——— said ———, the said premises were, by said party of the first part, duly advertised for public sale at the ——— door of the court house ———, in the county of ——— and state of ——— on the ——— day of ——— A. D. in the manner prescribed by said ——— deed, and were, upon the day and year at the place last mentioned aforesaid, in pursuance of said notice, sold at public sale, and, at said sale, the said party of the second part was the highest and best bidder therefor, and bid for the tract hereinafter described the sum of ——— dollars.

Now, therefore, these presents witness that the said party of the first part, in pursuance of the power and authority in him vested, in and by the said deed, and in consideration of the sum of one dollar, and also the further sum of ——— dollars, to the said party of the first part paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath and doth hereby convey, remise, release and quitclaim to the said party of the second part, his heirs and assigns forever, all the right, title and interest, as well in law as in equity, which the said party of the first part hath acquired by virtue of the ——— deed above mentioned, of, in and to all that certain tract, piece or parcel of land situated in the ——— county of ——— and state of ——— described as follows, to-wit:

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversions, remainders, rents, issues and profits thereof; and, also, all the estate, right, title, interest, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same and any and every part thereof, with the appurtenances, which the said party of the first part acquired by virtue of said deed.

To have and to hold the aforesaid right, title and interest of the said party of the first part, unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said party of the first part can, by virtue of the power and authority in him by said ——— deed vested, convey the same.

In witness whereof, etc.

Signed, sealed and delivered
in the presence of

A. B. (Seal)
Trustee.

Form 155.

Commissioners Deed Under Foreclosure.

This indenture, made the ——— day of ——— A. D. 190—. between ———, a commissioner duly appointed by the Superior Court of the ——— county of ——— state of ———, and in the action hereinafter mentioned, to make sale of the property hereinafter described, the party of the first part, and ——— the part— of the second part, witnesseth: Whereas, in and by a certain judgment and decree, made and entered by the said Superior Court on the ——— day of ——— 190—, in a certain action then pending in said court, wherein ——— it was among other things ordered, adjudged and decreed, that all and singular the mortgaged premises described in the complaint in said action, and specifically described in said judgment and decree, should be sold at public auction by the said party of the first part, as such commissioner, in the manner required by law, and according to the course and practice of said court; that such sale be made ——— in the said ——— county of ———, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, on such day as the said commissioner should appoint; that any of the parties to said action might become the purchaser at such sale, and that said commissioner should execute the usual certificate and deeds to the purchaser or purchasers, as required by law.

And whereas, the said commissioner did, at the hour of ——— o'clock, — M., on the ——— day of ——— 190—, after due public notice had been given, as required by the laws of this state and the course and practice of said court, duly sell at public auction, in the said ——— county of ——— agreeably to the said judgment or decree, and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the ——— premises in said judgment or decree, and hereinafter described, were fairly struck off to the said ———, the said part— hereto of the second part ——— for the sum of ——— dollars, ——— being the highest bidder—, and that being the highest sum bid for the same.

And whereas, the said part— of the second part thereupon paid to the said commissioner the said sum of money so bid by ———

And whereas, the said commissioner thereupon made and issued the usual certificate in duplicate of the said sale in due form of law, and delivered one thereof to the said purchaser— and caused the other to be filed in the office of the county recorder of said ——— county of ———

And whereas, more than twelve months have elapsed since the date of said sale, and no redemption has been made of the prem-

ises so sold as aforesaid, by or on behalf of the said judgment debtor—, the said ——— or by or on behalf of any other person.

Now, this indenture witnesseth: That the said party of the first part, the said commissioner in order to carry into effect the sale so made by him as aforesaid in pursuance of said judgment and decree, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of ——— dollars, ———, so bid and paid by the said purchaser—, the said part— of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said part— of the second part, and to ——— heirs and assigns forever, all th— certain lot—, piece— or parcel— of land, situate, lying and being in the said ———, county of ——— state of ——— and bounded and particularly described, as follows, to wit: together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises hereby conveyed, or intended so to be, together with the appurtenances, unto the said part— of the second part, ——— heirs and assigns forever.

In witness whereof, the said party of the first part to these presents has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered
in the presence of (SEAL).
Commissioner.

[Acknowledgment.]

Form 156.

Deed of Executor or Administrator.

This indenture, made the ——— day of A. D. 190—, by and between ——— as the duly appointed, qualified and acting ——— of the estate of ——— deceased, late of ——— the part— of the first part, and ——— of the ——— the part— of the second part, witnesseth: That whereas, on the ——— day of ——— A. D. 190—, the Superior Court of the ——— county of ——— state of ———, made an order of sale authorizing the said part— of the first part to sell certain real estate of the said ——— deceased, situate in the ——— county of ——— state of ———, and particularly described in said order of sale, and which said

order of sale, now on file and of record in the said Superior Court is hereby referred to for greater certainty:

And, whereas, under and by virtue of said order of sale, and pursuant to legal notices given thereof, the said part— of the first part, on the ——— day of ——— A. D. 190—, at the ——— of ——— in said ——— between the hours of nine o'clock in the morning and the setting of the sun on the same day, to wit: at ——— o'clock — M., offered for sale in ——— (*judging it the most beneficial to said estate*), at ——— and subject to confirmation of said Superior Court, the said real estate, situated in the said ——— and specified and described in said order of sale as aforesaid;

And, whereas, said part— of the first part, prior to the making of such sale, posted and published notices thereof as required and provided by law, and at such sale the said part— of the second part became the purchaser— of the ——— said real estate hereinafter particularly described for the sum of ——— dollars, ——— —he— being the highest and best bidder— and that being the highest and best sum bid;

And, whereas, the said Superior Court, upon the due and legal return of ——— proceedings under the said order of sale, made by the said part— of the first part on the ——— day of ——— A. D. 190—, after making the said sale ——— did on the ——— day of ——— A. D. 190—, make an order decreeing said sale to be valid and confirming said sale, and directing a conveyance to be executed to the said part— of the second part; a certified copy of which order of confirmation was recorded in the office of the county recorder of the ——— county of ———, within which the said land sold is situate, on the ——— day of ——— A. D. 190—, and which said record thereof in said recorder's office is hereby referred to for greater certainty;

Now, therefore, the said ——— as ——— of the estate of ———, deceased as aforesaid, the part— of the first part, pursuant to the order last aforesaid of the said Superior Court, for and in consideration of the sum of ——— dollars, ——— to ——— in hand paid by the said part— of the second part, the receipt whereof is hereby acknowledged, ha— granted, bargained, sold and conveyed, and by these presents do— grant, bargain, sell and convey unto the said part— of the second part,— heirs and assigns forever, all the right, title, interest and estate of the said ———, deceased, at the time of ——— death, and also all the right, title and interest that the said estate, by operation of law or otherwise, may have acquired other than, or in addition to, that of said intestate at the time of ——— death, in and to all th— certain lot—, piece— or parcel— of land, lying and being in said ——— state of ———, and bounded and particularly

described as follows, to wit:—Together with all the tenements, hereditaments and appurtenances whatsoever to the same belonging, or in anywise appertaining.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said part— of the second part, ——— heirs and assigns forever.

In witness whereof, the said part— of the first part— as ——— of the estate of said deceased as aforesaid, ha— executed these presents the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 157.

Grant of Exclusive Right of Burial.

Agreement, made this ——— day of ———, 19—, between ——— of ———, hereinafter called the Cemetery Association, and ——— of ———, hereinafter called the purchaser, witnesseth:

In consideration of the sum of ——— dollars, the receipt whereof is hereby acknowledged, said Cemetery Association hereby gives and grants unto the purchaser the exclusive right of burial for ——— and the persons to be named by ———, or in event of the failure of a nomination by said purchaser to his heirs, subject to all conditions and limitations, and with the privileges specified in the rules and regulations of said Cemetery Association now in existence, printed herewith on the back hereof, or which may hereafter be lawfully prescribed in and upon that certain parcel of land situated in ——— county, in the state of ———, described and designated on the plat of said cemetery, as now laid out as ——— lot No. ———, in section ———, containing ——— superficial feet.

In witness whereof, said Cemetery Association has caused these presents to be sealed with its corporate seal, signed by its president and countersigned by its secretary this ——— day of ———, 19—.

Form 158.

Deed by Trustees of a Religious Society, Conveying a Pew, Subject to Assessments to be Laid.

Know all men by these presents, that the trustees of the ——— society, of the ——— of ——— in the county of ——— and state of ——— the receipt whereof is hereby acknowledged, do

hereby sell and convey unto the said ——— the pew No. ——— in the church of the said society: To have and to hold the same unto the said ——— his heirs and assigns (*or, where the pew is personal estate,* his executors, administrators and assigns), for ever: subject, however, to all liabilities and incumbrances now lawfully existing and to such taxes and assessments as may, from time to time, be laid thereon by said society; provided, however, that no alteration shall be made in said pew, nor shall the same be sold or transferred, by deed of sale or mortgage, without the written consent of said society, or of their trustees for the time being; and, further, that if, at any time, there shall be owing from said pew a sum equal to one year's taxes or assessments, this conveyance shall be wholly void, and all the right, title and interest of the said ——— his heirs (*or,* executors, administrators) and assigns, in and to the said pew, shall revert to the said society.

In witness whereof we have hereunto set our hands and the corporate seal of said society, this ——— day of ———

(Corporate Seal.)

Form 159.

Deed to Correct Mistakes in Prior Conveyance.

This indenture, made this ——— day of ——— between A. B. of ——— of the first part, and T. U. B. of ——— of the second part, witnesseth:

Whereas, the said A. B. did, on or about the ——— day of ——— execute and deliver to the party of the second part, for the consideration therein mentioned, a conveyance of certain lands in ——— herein after more particularly described, which said conveyance is recorded in the office of the recorder of deeds of ——— county, book ——— page ——— of conveyances; and, whereas, in said conveyance, by mistake (*specify the error*); and, whereas, to prevent difficulties hereafter, it is expedient to correct said error; now, therefore, this indenture witnesseth that the said party of the first part, in consideration of the premises and of one dollar to him paid by the party of the second part, hereby grants, conveys, releases and confirms unto the said party of the second part, his heirs and assigns, forever, all that lot, piece or parcel of land, situated, lying and being in the county of ——— and state of ——— described as follows: (*insert description*) together with all and singular the hereditaments and appurtenances, etc.

Form 160.

Attestation of Deed in Which Erasures of Interlineations Appear.

In witness whereof the said part— of the first part has (*have*) hereunto set his (*their*) hand— and seal—, this ——— day of ———

(Signature) (SEAL).

Signed, sealed and delivered in the presence of; *the word "seven" on the first part was erased, the words "be the same more or less" written over an erasure on the third page and the words "dower and right of dower" cancelled on third page before execution.* S. T.

Form 161.

Grant of a Water Right.

Know all men by these presents, that I, A. B. of, for and in consideration of the sum of ——— dollars, to me in hand paid by C. D., of ——— at and before the ensealing of these presents, the receipt whereof is hereby acknowledged, have given, granted, and confirmed, and by these presents do give, grant and confirm, unto him, the said C. D., his heirs, executors, administrators and assigns, the free and full use, benefit and enjoyment of a certain rill or stream of water, rising and beginning on the property and land of the said A. B. situate, lying and being ———, all the water of said rill or stream to be led or conveyed from the above described premises of the said A. B. by means of any convenient sluice, channel, flume, water pipe, trough or other conveyance in to the land of the said C. D., or elsewhere, at the option of the said C. D., his heirs and assigns, together with free ingress, egress and regress to and for the said C. D., his heirs and assigns, and his and their servants and workmen, with horses, carts and carriages, at all convenient seasons through the land of the said A. B., his heirs and assigns, in and along the bounds or sides of the said sluice, channel, flume, water pipe, trough or conveyance, for amending, cleaning and repairing the same, with liberty and privilege for that purpose to dig and take stones and earth from the adjacent land of the said A. B., when and as often as need be and occasion require; to have and to hold all and singular the watercourse and privileges hereby granted, with the appurtenances. unto the said C. D., his heirs and assigns forever, he

or they paying and discharging all the expenses which, from time to time, may accrue in supporting, cleansing and repairing the dam and watercourse aforesaid.

In witness whereof, etc.

In presence of

Form 162.

Deed of a Right of Way.

This indenture, made this ——— day of ——— in the year one thousand nine hundred and ——— between A. B. of ——— county of ——— and state of ——— of the first part, and C. D. of ——— of the second part, witnesseth: That the said A. B., for and in consideration of the sum of ——— dollars, unto him well and truly paid by the said C. D., the receipt whereof is hereby acknowledged, hath granted, bargained and sold and does grant, bargain and sell unto the said C. D., his heirs and assigns, the free and uninterrupted use, liberty and privilege of and passage in and along a certain alley or passage, of ——— feet in breadth by ——— feet in depth, extending out and from (*describe the direction of the way*); together with free ingress, egress and regress to and for the said C. D., his heirs and assigns and his and their tenants, under tenants (*if for a carriage way here add,* with carts, vehicles, carriages, horses or cattle, as by him or them shall be necessary and convenient), at all times and seasons for ever hereafter, in to, along, upon and out of the said alley or passage way, in common with him, the said A. B., his heirs and assigns and his and their tenants or under tenants. To have and to hold all and singular, the privileges aforesaid to him the said C. D., his heirs and assigns, to his and their only proper use and behoof, in common with him, the said A. B., his heirs and assigns as aforesaid (*and, if so stipulated,* subject nevertheless, to the moiety or equal one-half part of all necessary charges and expenses which shall, from time to time, accrue in paving, amending, repairing and cleansing the said alley or passageway).

In witness whereof I have hereunto set my hand and seal, the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 163.

Right of Way Pursuant to Order of Board of Supervisors.

Whereas, the Board of Supervisors of the county of ——— in the State of ———, did on the ——— day of ——— 190—,

by an order duly made and entered in the minutes of said Board, establish a public highway in ——— Road District in said county, on the petition of ——— and others.

Now, therefore, I, ——— for and in consideration of the sum of ——— dollars, grant to the said county of ——— the right of way and incidents thereto for a public highway, all that real property, situated in said road district, county and state aforesaid, described as follows, to wit:—the foregoing described land being included in the survey of said road.

Witness my hand this ——— day of ———, 190—.

Form 164.

Deed of a Right of Way Through Road with Horses, Carriages, Etc.

This indenture, made the ——— day of ——— 19—, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part, witnesseth that, in consideration of the sum of ——— dollars now paid to the said party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part hereby grants and conveys unto the said party of the second part, and his heirs, full and free right and liberty for the said party of the second part, his heirs and assigns, and his and their agents and servants, and the tenants and occupiers for the time being of the farm and the said party of the second part hereinafter mentioned, and all and every other persons and person for the benefit and advantage of the said party of the second part, his heirs and assigns, from time to time and at all times hereafter, at his and their will and pleasure, and for any and all purposes to go, return, pass and repass, with horses, carts, wagons and other vehicles, loaded or unloaded, and also to drive cattle and other beasts in, through, along, and over a certain road or way lately formed and fenced off by the said party of the first part, out of and from a certain pasture in the town of ——— and the county of ———, belonging to the said party of the first part, which road or way is ——— feet in width and ——— rods in length, or thereabouts, and leads from the turnpike road, or public highway, opposite or adjacent to the property of the said party of the second part, in the town of ——— aforesaid, the course, direction, and extent of which road or way are marked in the plan hereto annexed, which also shows the property of the said party of the second part; and also free right and liberty to the said party of the second part, his heirs and assigns, and all or any such persons or person as aforesaid, from time to time and at all times hereafter, with workmen, horses, carts, and other

persons and things, to enter in or upon the said road or way, the right of user whereof is hereby granted, and to make and lay causeways and bridges or otherwise to repair the said road or way as the necessity therefor may arise. And the said party of the second part covenants with the said party of the first part that he, the said party of the second part, his heirs and assigns, will from time to time and at all times hereafter, at his or their own expense, repair and keep repaired, in a proper, substantial, and workmanlike manner, the said road or way, the right and liberty of user whereof is hereby granted, and also the gate erected by the said party of the first part across the said road or way at the northern end or extremity thereof, and the lock and fastening belonging thereto; and will from time to time, and at all times hereafter, at the like expense of the said party of the second part, his heirs or assigns, repair and renew the hedge lately planted by the said party of the first part, and the fence on both sides of the said road or way; and also that the said party of the second part, his heirs and assigns, and his and their agents and servants, and the tenants and occupiers for the time being of his said property using the said road or way, the user whereof is hereby granted, will, if and whenever and so long as the said party of the first part, his heirs or assigns, the owner or owners for the time being of the said lands adjoining the same road shall so require, immediately after having used and passed through the said gate, shut and lock the same. In witness, etc.

Form 165.

Release of a Right of Way from Grantee to Grantor.

This indenture, made the ——— day of ———, 19—, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part, witnesseth:—

Whereas by an indenture dated the ——— day of ———, and recorded with ——— deeds, book ———, page ———, made and executed between the said parties, the said party of the second part did thereby grant to the said party of the first part, his heirs and assigns, a certain right of way for horses, carts, wagons, carriages of every description, and cattle of all kinds, over, upon, and along a certain road or way laid out upon the land of the said party of the second part, a plan of which said road is recorded with said indenture; and whereas the said party of the first part has agreed to relinquish his right of way unto the said party of the second part for the sum of ——— dollars:—

Now this indenture witnesseth that, in consideration of the said sum of ——— dollars, paid by the said party of the second part

to the said party of the first part, the receipt whereof is hereby acknowledged, he, the said party of the first part, has remised, released and forever quitclaimed and does by these presents remise, release, and forever quitclaim unto the said party of the second part and his heirs all that road or right of way as aforesaid granted, and all rights and privileges whatsoever which the said party of the first part has now in, over, or upon the same; to the intent that the said right of way may be forever extinguished, and that the said party of the second part, his heirs and assigns, shall and may at all times hereafter have and enjoy the said premises over which such right of way was so granted, freed and absolutely discharged therefrom, and all other easements and privileges whatsoever of the said party of the first part, his heirs or assigns, or any other person or persons rightfully claiming by, from, through, or under him.

And the said party of the first part doth hereby for himself, his heirs, executors, and administrators, covenent with the said party of the second part, his heirs and assigns, that he, the said party of the first part, now has in himself good right to release the said right of way unto the said party of the second part, his heirs and assigns, in manner aforesaid; and also that he, the said party of the first part, and all persons rightfully claiming through or under him, shall and will, from time to time, and at all times hereafter, at the request and costs of the said party of the second part, his heirs or assigns, enter into, execute, and perfect all such further releases, for the further or more perfectly releasing and confirming the said road or right of way hereby released unto the said party of the second part, his heirs and assigns, according to the true intent and meaning of these presents, as the said party of the second part, his heirs and assigns, or his or their counsel in the law, shall require, and as shall be tendered to be done and executed. In witness, etc.

Form 166.

Reservation of a Right of Way.

Reserving unto the grantor, his heirs and assigns, who may be owners for the time being of all or any part of the adjoining piece of land colored (*blue*) on the said plan, and unto all persons going to or from any part of said last-mentioned piece of land, a perpetual right of way in common with the purchaser, his heirs and assigns, at any and all times and for any and all purposes, with or without vehicles and animals from and to the highway called ——— road in ——— aforesaid, over and across the land hereby conveyed and shown on said plan, subject to the payment by the

grantor and others as aforesaid enjoying said right of way, of a just and fair proportion of the expense of maintaining and keeping said way in good condition and repair.

Form 167.

Dedication of Highway.

I, ———, of the town of ———, county of ———, state of ———, in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged hereby dedicate to said town a strip of land across my premises, in said town, for the purposes of a highway described as follows: (*insert description*), and I for a like consideration do also hereby release said town from all damages by reason of the laying out and opening of said highway.

In witness, etc.

Form 168.

Right of Way, Subject to Liability to Repair.

This Indenture, etc.

Together with full liberty at any and all times hereafter, and for any and all purposes, with or without horses, carts, carriages, or wagons, or other vehicles, to pass and repass, and to drive cattle, sheep, and other animals over and upon the said road delineated on said plan, the said grantee, his heirs, executors, administrators, and assigns, from time to time paying their just, fair and due proportion with other owners whose land abuts upon or adjoins said road, according to the extent of his or their frontage, of the expense of maintaining the said road, and of the fences adjoining the same, in proper condition and repair, until the same shall be accepted and laid out by the proper legal authority.

In witness, etc.

Form 169.

Right in Passageway—Common Use.

This Indenture, etc.

Together with the right, liberty and privilege to use the said passage-way in common with the said grantor, his heirs and assigns, and the owners and occupiers for the time-being of all other houses adjoining the passage-way above said.

In witness, etc.

Form 170.

Right of Way Reserved.

This Indenture, etc., grants, etc., (*description.*)

Excepting and reserving unto the said grantor, his heirs and assigns, full and free right and liberty at any and all times hereafter, in common with all other persons who may after the date hereof have the right, to use said passage-way at any and all times and for any and all purposes connected with the use and occupation of the said grantor's other lands and houses adjoining the same.

In witness, etc.

Form 171.

Another Form of Same.

This Indenture, etc.

Reserving nevertheless unto the grantor, his heirs and assigns, who may be owners for the time being of all or any part of the adjoining piece of land colored (*blue*) on the said plan a perpetual right of way in common with the grantee, his heirs and assigns, at any and all times and for any and all purposes, with or without vehicles and animals, from and to the public highway called ——— road over and across the plot of land colored (*red*) on the said plan, subject to the payment of a just and fair proportion of the expense of maintaining and keeping the said road in good condition and repair.

In witness, etc.

Form 172.

Fences and Roads to be Maintained by Grantor.

This Indenture, etc.

And the said grantor hereby covenants with the grantee that he, the grantor, his heirs or assigns, will, within ——— years from the date of this indenture, make and set up and forever thereafter keep and maintain, at his and their own cost and expense, in a proper and substantial manner, good and sufficient fences on and separating the hereby granted and conveyed lands adjoining the roadways hereinbefore described from the said roadways; and also will, at his and their own expense, make within ——— years from the date of this indenture, and forever thereafter, until the roadways hereinbefore described shall be dedicated to the public use, keep and maintain on, over, and along said roadways a good

and substantial road, and complete the same fit for horses, carriages and vehicles of all kinds.

In witness, etc.

Form 173.

Roads—Grantee to Contribute to Maintain Road.

This Indenture, etc.

Subject to the duty and obligation of contributing and paying a just and due proportion of the expense of making, maintaining, and repairing said roads, ways, sewers, and drains until the same shall be accepted by and taken into the charge of said city such proportion to be according to the extent of frontage on said roads and ways, or, in case any dispute should arise as to such proportion to be determined by the surveyor for the time being of the said grantor, his heirs and assigns.

In witness, etc.

Form 174.

Deed of Mining Claim.

This indenture, made the ——— day of ——— A. D. 190—, between ——— the part— of the first part, and ——— the part— of the second part, witnesseth: That the said part— of the first part, for and in consideration of the sum of ——— dollars, lawful money of the United States of America, to ——— in hand paid by the said part— of the second part, the receipt whereof is hereby acknowledged, ha— granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do— grant, bargain, sell, remise, release and forever quitclaim, unto the said part— of the second part, and to ——— heirs and assigns, ——— together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said part— of the first part, of, in or to the said premises, and every part and parcel thereto, with the appurtenances.

To have and to hold all and singular the said premises, together

with the appurtenances and privileges thereunto incident, unto the said part— of the second part.

In witness whereof, the said part— of the first part ha— hereunto set ——— hand— and seal— the day and year first above written.

Signed, sealed and delivered
in the presence of

Form 175.

Another Form of Same.

This indenture, made this ——— day of ——— in the year of our Lord one thousand nine hundred and ———, between A. B., the party of the first part, and C. D., the party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, of the United States of America, to ——— in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns forever, the following described real ——— property, to wit:

Together with all dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof.

To have and to hold, all and singular, the said premises, together with appurtenances and privileges thereto incident unto the said party of the second part, his heirs and assigns forever.

In witness whereof, etc.

Form 176.

Deed Excepting from Grant Mines and Seams of Coal.

This Indenture, etc.

Excepting out of this deed, and always reserving unto the said grantor, his heirs and assigns, all mines, veins, and seams of coal, and all other mines and minerals lying and being within or under the said lands and hereditaments hereby granted, together with full and free liberty for the said grantor, his heirs and assigns, and his and their lessees, agents, and workmen, and all other persons by his or their authority or permission, whether already given

or hereafter to be given at any time and from time to time, but by underground workings only, and without entering upon the surface of the said lands and hereditaments hereby granted, or any of them, to search for, obtain, work, take away, and dispose of the said expected premises, and also all or any other mines or minerals lying and being within or under any adjoining and neighboring lands, and with or without leaving any support to the surface of the said lands and hereditaments hereby conveyed, and whether such surface shall or shall not, by any subsidence thereof or otherwise, be depressed, lowered, damaged, or destroyed, and to make, maintain, and use any water-courses, ways, and other works under any part of the said lands and hereditaments hereby granted as he the said grantor, his heirs or assigns, or other persons availing themselves of these present powers shall think suitable or proper; he, the said grantor, his heirs and assigns, and such other persons as aforesaid shall not be in any manner liable or responsible for any depression, subsidence, damage, or injury whatsoever which shall or may be caused or occasioned to the surface of the said lands and hereditaments hereby granted, or any part thereof, or to any erection, building, engine, machinery matter, or thing now being or hereafter to be in the said lands and hereditaments hereby granted by the working and obtaining and carrying away, or by the having worked or obtained and carried away whether by the said grantor, his heirs and assigns, or any such other person as aforesaid, of the said excepted premises, or such other mines, and minerals as aforesaid. To have and to hold all the same premises except as aforesaid, and subject to the exercise of all or any of the liberties and powers hereinbefore reserved unto and to the said grantee, his heirs and assigns.

Form 177.

Deed Excepting Minerals and Right to Work Them.

Saving and excepting out of the grant hereby made all mines and minerals under the said property hereby granted, with full power for the grantor, his heirs and assigns, to take all usual, necessary, proper or convenient means for working, getting, laying up, dressing, making merchantable, and taking away the said mines and minerals, and also for the above purposes, or for any other purpose whatsoever, to make and repair tunnels and sewers, and to lay and repair pipes for conveying water to and from any manufactory or other structure.

In witness, etc.

Form 178.

Deed to Incorporate Mining Claim.

This indenture, made the ——— day of ———, in the year of our Lord one thousand nine hundred and ——— between ——— the part— of the first part, and ——— the part— of the second part, witnesseth: That whereas, the said ——— has been duly incorporated under the laws of the ——— and it is intended by this instrument to transfer to the said part— of the second part, all the right, title and interest of the said part— of the first part, which they and each of them have and claim in and to the mining ground— and claim— or lode—, and ——— appurtenances, hereinafter described:

Now, therefore, know all men by these presents, that the said part— of the first part, and each of them whose names are hereunto subscribed, in consideration of Certificates of Stock in said Incorporated Company hereafter to be issued to them, their and each of their heirs and assigns, in conformity with the By-Laws of said Corporation heretofore adopted, do hereby grant, bargain, sell, transfer, remise, release, and quit-claim unto the said part— of the second part, its successors and assigns, all their and each of their right, interest, claim and demand whatsoever, in law or equity, of, in or to all ——— certain mining ground—, claim— or lode— situate, lying and being ——— together with all the dips, angles, spurs and variations of said mining ground—, claim— or lode—, and all and singular the hereditaments and appurtenances thereunto belonging.

To have and to hold, the said premises with their appurtenances, unto the said part— of the second part, ——— sucessors and assigns forever.

In witness whereof, etc.

Form 179.

Deed of Equity of Redemption Purchaser Agreeing to Pay Mortgage.

Whereas by a mortgage dated the ——— day of ——— and recorded in, book ———, page etc. ———, the mortgagor conveyed unto C. D. the land hereinafter described in fee simple by way of mortgage for securing the principal sum of ——— dollars, payable in ——— years from said date, and interest in accordance with the terms and stipulations therein contained.

And whereas the said principal sum of ——— dollars, with

interest thereon from the ——— day of ———, remains owing on such mortgage.

And whereas the owner has agreed to sell the said tract of land in fee simple to the purchaser, subject to the said mortgage.

Now in consideration of ——— dollars paid to the owner by the purchaser, the receipt whereof the owner, hereby acknowledges, the owner hereby grants and conveys unto the purchaser all that parcel of land (*describing it*): To hold the same to the purchaser, his heirs and assigns, subject to the said mortgage for the principal sum of ——— dollars and all interest now due and hereafter to become payable thereon or thereby.

The purchaser hereby covenants with the owner that he, the purchaser, his heirs, executors, administrators or assigns, will pay the principal sum and interest now due or hereafter to become due, secured by said mortgage, and will at all times hereafter keep the owner, his estate and effects, indemnified safe and harmless from all actions, claims and demands on account thereof. In witness, etc.

Form 180.

Deed of Equity of Redemption where Mortgage is Kept Alive for the Protection of Grantee.

This Indenture, etc.

Now in consideration of the payment of ——— dollars by A. B. to C. D. and the sum of ——— dollars retained by said ——— in satisfaction of the principal and interest due him under said mortgage, the said ———, hereby releases and conveys unto ———, all that parcel of land (*describing it*): To hold the same unto ——— in fee simple, freed and absolutely discharged from all right or claim of redemption of ——— under, but otherwise subject to the said mortgagee.

The said ——— hereby releases ——— from his covenants for the payment of the principal and interest of said mortgage, and from all claims and demands arising by or from said mortgage.

The said ——— declares that the said principal sum of ——— dollars, and the interest due and to accrue due thereon, shall not merge in the equity of redemption of said premises, but shall be kept alive and on foot as a charge thereon so as to protect the said ——— (*the purchaser*) against all incumbrances, charges and estates, if any such there be, subsequent to said mortgage. In witness, etc.

Form 181.

Release of Dower.

This indenture made the ——— day of ———, between A. B. of ———, of the first part, and C. D. of ——— of the second part,

Whereas E. F., late of ——— in the county of ——— and state of ———, died on the ——— day of ——— intestate, leaving the said A. B., party of the first part, his wife, and the said C. D., party of the second part, his sole heir at law, him surviving:

And whereas the said intestate was at the time of his decease seized of an estate of inheritance in fee simple of certain lands and tenements, in which the said A. B. is entitled to dower.

And whereas the said A. B. has, in consideration of the sum of ——— dollars to be paid to her by the said C. D. agreed to release all her right and title to dower:

Now this indenture witnesseth, that in pursuance of the said agreement and in consideration of the sum of ——— dollars paid by the said C. D., the receipt whereof is hereby acknowledged, the said A. B. hereby releases unto the said C. D., his heirs and assigns, all right, title, claim or demand of or to dower which she has, or if these presents had not been executed, could claim of, in or to all or any part of the lands and tenements of which her said husband died seized as aforesaid: and she the said A. B. hereby covenants with the said C. D., his heirs and assigns, that neither she, the said A. B., nor any other person for her or in her name shall at any time hereafter bring or prosecute any claim or demand against the said C. D. (*heir*), his heirs or assigns or his or their lands or tenements for, or by reason of, any dower due to her, but she and they shall forever hereafter by these presents be excluded and barred of and from all actions, claims and demands of dower in and to the same.

In witness, etc.

Form 182.

Release of Dower—Another Form.

Know all men by these presents that I, ——— of ———, in the county of ——— and state of ———, widow of ———, late of said county and state, in consideration of ——— dollars to me paid by ——— of ———, in said county and state, heirs of the said, deceased, the receipt whereof is hereby acknowledged, do hereby grant, remise, release, and forever quit-claim unto the said ———, their heirs and assigns forever, all the dower right, title, interest and demand whatsoever which I may have in law or in

equity, in the lands of said ———, described as follows: (here insert description; or if the release is intended to be general, use instead, all the lands, tenements and real estate whereof the said ——— was seized or possessed) so that neither I, my heirs, executors, administrators, or assigns, nor any other person or persons for me, shall have or make any claim, demand or right of dower in and to said lands, or any part thereof, but shall be utterly barred and excluded forever.

In witness, etc.

Form 183.

Release of Dower by Indorsement on Deed.

This indenture witnesseth, that I, A. B. of ———, widow (or wife) of C. D., deceased, named herein, in consideration of ——— dollars to me in hand paid by E. F. of ——— named herein, the receipt whereof is hereby acknowledged, do grant, remise, release and quit-claim unto the said E. F. all my right, title, interest and dower in and to the premises described within.

In witness, etc.

Form 184.

Assignment of Dower.

This indenture, made this ——— day of ——— 19—, between ——— of ———, party of the first part, and ——— of ———, widow of ———, party of the second part, witnesseth:

Whereas said ——— was, in his lifetime and at the time of his death, seized of certain lands and tenements in ——— in fee simple, which, by reason of said decease of said ———, descended to said parties of the first part, subject to the dower right of said party of the second part:

Now, therefore, said parties of the first part do hereby endow, assign, and set over unto said party of the second part, and said party of the second part agrees to receive and accept as said dower and her right thereunder one-third of all the lands and tenements of said husband, which portion so set aside is described as follows: (*insert description of lands*).

To have and to hold the same unto the said party of the second part, widow of said ———, for and during her natural life, in the name of dower, and in satisfaction of all the dower rights that she ought to have in or to the said lands and tenements, which belonged to said ———.

In witness, etc.

Form 185.

Release by tenant by the curtesy.

Indenture made the ——— day of ——— between A. B. (*tenant by the curtesy*) of the one part and C. D. (*heir*) of the other part.

Whereas the said A. B. on the ——— day of ———, intermarried with E. F. his late wife then (G. H.) of ———;

And whereas the hereditaments hereby conveyed and the inheritance thereof in fee simple devolved upon and descended to the said G. H. during her coverture as the only child and sole heir at law of ———, late of ———, who died on the ——— day of ——— intestate:

And whereas the issue of the said marriage between the said A. B. and E. F., his wife was one child, namely, the said C. D.:

And whereas the said E. F. died on the ——— day of ——— intestate, and thereupon the said A. B. became and is now seized of or entitled to the said hereditaments hereafter described and hereby conveyed with their appurtenants for an estate for his life as tenant by the curtesy:

And whereas the said A. B. in consideration of the sum of ——— dollars has agreed to sell the estate and interest of him the said ——— tenant in the said hereditaments:

Now this indenture witnesseth that in pursuance of the said recited contract and in consideration of the sum of ——— dollars to the said A. B. now paid by the said C. D. the said A. B. as owner hereby releases unto the said C. D., his heirs and assigns, all the estate for life or tenancy by the curtesy which he, the said A. B. has or if these presents had not been executed could claim of, to or in the hereditaments to which the said E. F. was entitled at her decease and in which the said A. B. could claim an estate by the curtesy.

In witness, etc.

Form 186.

Conveyance of life estate.

Whereas, by virtue of a deed dated the ——— day of ———, the land hereinafter described was conveyed to the grantor during his life; and whereas the grantor has agreed with the grantee to sell to him the life estate of the grantor in said land for the price of ——— dollars: Now in consideration of ——— dollars paid to the grantor by the grantee, the receipt whereof the grantor hereby acknowledges, the grantor hereby grants and conveys unto the pur-

chaser all that parcel of land (*described*). To hold the same unto the said grantee, his executors, administrators and assigns, during the remainder of the life of the grantor.

Form 187.

Life Tenant, in Release of Reversion to.

This Indenture etc.

To have and to hold the said property unto the said ———, his heirs and assigns, subject to the estate for life of the said ——— therein, to the intent that the same may merge and be extinguished in the reversion and the inheritance of the said premises, and that the said ——— thereafter may be seized of or entitled to the fee simple and inheritance in possession thereof.

In witness, etc.

Form 188.

Life Estate—Property Subject to

This Indenture, etc.

Which said property is conveyed subject to an estate for life devised to ——— of ———, by the will of ———, late of ———, which said will was proved and allowed by the probate court in and for the county of ——— on the ——— day of ———, 19—.

In witness, etc.

Form 189.

Lease. Property Subject to.

This Indenture, etc.

Which said premises are property is subject to a lease thereof, made by ——— to ———, bearing date the ——— day of ———, 19—, for the term of ——— years, at the yearly rent of ——— dollars.

In witness, etc.

Form 190.

Lease—Property Subject to Another Form.

This Indenture, etc.

To hold the same unto the said ——— (*grantee*) in fee simple subject to a lease thereof dated the ——— day of ———, made

between (*parties*) and the term of ——— years thereby created, but with the full right to and benefit of the rent thereby reserved and the lessees' covenants and stipulations therein contained.

In witness, etc.

Form 191.

Trustees' deed under power in will.

Know all men by these presents that, we, A. B. and C. D., both of ———, in the county of ——— and the state of ———, trustees under the last will of E. F., late of ———, in the county of ——— and state aforesaid, deceased, which will was duly proved and allowed by the probate court for said county on the ——— day of ———, A. D. 19—, do by virtue and in execution of the power to us given in and by said will, and of every other power and authority us hereto enabling, and in consideration of the sum of ——— dollars, and other good and valuable considerations, to us paid by ——— of said ———, the receipt whereof is hereby acknowledged, hereby grant, bargain, sell, and convey unto the said G. H. a certain parcel of land (*describing it.*)

To have and to hold the above granted premises, with all the privileges, and appurtenances thereto belonging, to the said G. H. and his heirs and assigns, to their own use and behoof forever.

In witness whereof we, the said A. B. and C. D., trustees as aforesaid, hereunto set our hands and seals this ——— day of ———, in the year 19—.

Form 192

Trustees' Deed Under Will and Decree of Court to Wife of one Trustee, and Acceptance.

This indenture, made this ——— day of ———, 19—, by and between ——— of ———, in the county of ——— and state of ———, and ——— of ———, in the county of ———, trustees under the last will of ———, late of said ———, deceased, of the first part; ——— of ———, of the second part (*through whom title is passed*); and ———, wife of said ——— (*one of said trustees*), of the third part, witnesseth: Whereas under and by virtue of a decree of (*describing the court*) made upon the petition of said trustees on the ——— day of ———, 19—, the said trustees were empowered to sell to said ———, wife of ——— (*one of said trustees*), for the consideration of ——— dollars, the house and land formerly occupied by said testator, situate at ———, in the county of ———, free and discharged of all trust

under said will, and for the purposes of such sale to convey said estate by good and sufficient instrument of conveyance to some person to be selected by said trustees, to be by him conveyed to said ———, wife of ——— (*one of said trustees*), free from trust as aforesaid, as by reference to said decree, a copy whereof is hereto attached will more fully appear: Now we, the said ——— and ———, trustees as aforesaid, under and in pursuance of the authority on us conferred by said decree, and by virtue of the powers on us conferred by the will of said testator, and of all other powers us thereto enabling, and for the purpose of the sale so authorized, and in consideration of ——— dollars to us paid by the said ———, wife of ——— (*one of said trustees*), receipt whereof is hereby acknowledged, and of the release herein contained, executed by the said ———, wife of ——— (*one of said trustees*), do hereby bargain, sell, convey, release, and forever quitclaim unto the said ———, party of the second part, all that, etc.: To have and to hold unto the said party of the second part, his heirs and assigns, forever, to his and their use, free and discharged from the trusts of said will, but without covenant, warranty, or liability on the part of us, or either us, express or implied. And I, the said party of the second part, in consideration of the said payment of ——— dollars, and of ——— dollars to me paid by said ———, wife of ——— (*one of said trustees*), receipt whereof is hereby acknowledged, do hereby bargain, sell, convey, release, and forever quitclaim unto the said ———, wife of ——— (*one of said trustees*), the above described premises, with all said rights, privileges, and appurtenances, and subject to said restrictions: To have and to hold to her, the said ———, wife of ——— (*one of said trustees*), her heirs and assigns, to her and their use forever, free and discharged of the trusts of said will, but without covenant, warranty, or liability on my part, express or implied. And whereas under the ——— clause of the said will it is provided as follows, namely, the trustees may invest a portion of the trust fund in a house, taking the deeds in their names as trustees, suitable for the residence of either of my daughters, in which case they shall credit the interest of the cost thereof to such daughter as part of her share of said income: Now, therefore, I, the said ———, wife of ——— (*one of said trustees*), daughter of the said testator, hereby agree to and accept the above sale and conveyance, and in consideration thereof do hereby release and forever discharge the said trustees and their successors in the trusts under the said will from all obligations, if any such exist, by reason of said provision in said will, to invest any portion of the trust funds held by them under said will in any house for my residence, and from any and all obligation or liability whatsoever under said clause in said will, hereby acknowledging that the above

conveyance is received in full discharge, satisfaction, and performance therof. In witness whereof, etc.

Form 193.

Trustees' Deed Pursuant to a Power of Sale in a Will Where the Heirs and Legatees Join.

This indenture, made the ——— day of ———, 19—, between A. B. of ———, and C. D. of ———, trustees of the first part; E. F. of ———, heir at law, of the second part; G. H. of ——— and X. Y. of ———, legatees, of the third part; and N. O. of ———, purchaser, of the fourth part.

Whereas ———, late of ———, deceased, by his last will dated the ——— day of ———, devised all his real and personal estate unto the said trustees, their heirs, executors, administrators, and assigns, upon trust to sell and dispose of the same by public auction or private contract, and out of the proceeds of such sale or sales to pay all the said testator's debts, funeral and testamentary expenses, and certain legacies bequeathed to the said parties of the third part, and to stand possessed of the residue upon certain trusts in said will expressed and contained; and the said testator declared that the receipts of the trustees or trustee for the time being of his said will should be a sufficient discharge to purchasers, and effectually relieve them from all responsibility with respect to the application of the purchase moneys; and the said testator also appointed the said trustees joint executors of his said will;

And whereas the said testator died on the ——— day of ———, 19—, leaving said party of the second part his sole heir at law without having altered or revoked his said will, which was duly proved by the said trustees the executors therein named, in the probate court for the county of ———, on the ——— day of ——— following:—

Now this indenture witnesseth, that in consideration of ——— dollars, paid by the said party of the fourth part to the said trustees, the receipt whereof is hereby acknowledged, they, the said ——— and ———, trustees as aforesaid, do hereby give, grant, bargain, sell, and convey, and the said party of the second part doth hereby grant, bargain, sell, and confirm, and the said parties of the third part and each and every of them do by these presents remise, release, and quitclaim, unto the said ——— all that parcel of land situate, etc., together with all the estate, right, title, and interest, both legal and equitable, of the said parties of the first, second, and third parts, of, in, and to the said hereditaments and premises.

Form 194.

Trustees' Quitclaim Deed under a Conveyance to them in Trust.

Know all men by these presents that we, ——— and ———, acting in pursuance and by virtue of the powers in us vested by a deed to us from ———, dated the ——— day of ———, A. D. 19—, recorded with ——— deeds, book ———, page ———, and a declaration of trust as to the premises thereby conveyed, dated the ——— day of ———, A. D. 19—, and recorded with ——— deeds, book ———, page ———, and of every other power and authority us hereunto enabling, and in consideration of ——— dollars paid by ——— of ———, the receipt whereof is hereby acknowledged, have remised, released and quitclaim and do hereby remise, release, and forever quitclaim unto the said ——— all that piece or parcel of land situate in ———, county of ———, state of ———, and bounded and described as follows, etc., being part of the premises conveyed to us by said ——— by the above recited deed.

This deed is made subject to the restrictions, stipulations, and agreements mentioned or referred to in an agreement to which we are parties, dated the ——— day of ———, A. D. 19—, recorded with ——— deeds, book ———, page ———, so far as said agreement concerns the premises hereby conveyed.

To have and to hold the above released premises, with the rights, easements, and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their use and behoof forever.

And we, the said ——— and ———, for ourselves and our heirs, executors, and administrators, do covenant with the said ——— and his assigns, that the premises are free from all incumbrances made by us, except as aforesaid; and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said ——— and his assigns forever, against the lawful claims and demands of all persons claiming by, through, or under us, except as aforesaid, but against none other.

In witness whereof we, the said ——— and ———, trustees as aforesaid, have hereunto set our hands and seals, etc.

Form 195.

Deed by the heir and executors of a vendor who died pending a Contract Sale.

This indenture, made the ——— day of ———, 19—, between ——— of ———, heir at law, of the first part; ——— and ———,

executors of the last will and testament of ———, deceased, of the second part; and A. B., purchaser, of the third part, witnesseth:

Whereas by a written agreement dated the ——— day of ———, and made and entered into between said ———, deceased, of the one part, and the said A. B., of the other part, the said ———, deceased, agreed to sell the land and premises hereinafter described to the said A. B. for the sum of ——— dollars;

And whereas the said ——— died on or about the ——— day of ———, leaving the said party of the first part his sole heir at law surviving him, having by his will duly executed appointed the said parties of the second part joint executors of his said will, who duly proved the same in the court in and for the county of ———, on the ——— day of ——— last:—

Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of ——— dollars paid by the said A. B. to the said executors, the receipt whereof they hereby acknowledge, and also in consideration of the sum of one dollar paid by the said A. B. to the said party of the first part, the receipt whereof is hereby acknowledged, the said party of the first part, in respect only of such estate as is vested in him as such heir at law, but not further or otherwise, and at the request and by the direction of the said executors testified by their joining herein, doth by these presents grant, remise, release, and convey, and the said executors do by these presents release, ratify and confirm unto the said A. B. all that parcel of land, lying and situate, etc.

Form 196.

Deed by husband's grantee through whom title is passed to husband's wife for life, remainder to his daughters.

Know all men by these presents that Whereas ——— of ———, in the county of ——— and state of ———, by his deed of even date to be recorded herewith, conveyed to me the dwelling-house and land hereinafter described, in trust, however, for the purposes by these presents declared, that is to say, in trust to convey the said dwelling-house and land to ———, wife of said ———, for her life, and after her decease, subject to such life estate, to the daughters of said ———, namely, ——— and ———, their heirs and assigns, in fee simple, as tenants in common, in equal shares: Now, therefore I, ———, of etc., in execution of said trust, and in fulfillment of the same as evidenced by the written assent hereto of the said ———, and in pursuance of every other power, title, and estate in me hereto enabling, and in consid-

eration of the sum of one dollar and other good and valuable considerations to me paid by the said ——— (*wife of said* ———), the said ——— and ——— (*daughters of the said* ———), the receipt whereof I hereby acknowledge, do hereby give, grant, bargain, sell, and convey unto the said ——— (*wife*), for and during her life, and from and after her decease to the said ——— and ——— (*daughters*), their heirs and assigns, forever, in equal shares, as tenants in common, a certain tract of land situated (*description*).

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— (*wife*) for and during her life, and after her decease to the said ——— and ——— (*daughters*), and their heirs and assigns, as tenants in common, in equal shares, to their own use and behoof forever.

Form 197.

Deed Subject to Mortgage Assumed by Grantee.

This indenture, etc.

1. Now in consideration of ——— dollars paid by the grantee the receipt whereof the grantor hereby acknowledges, the grantor hereby grants and conveys unto the grantee all that certain tract or parcel of land, etc (*described*). To hold the same unto the purchaser in fee simple subject to a mortgage made by the grantor to ———, dated the ——— day of ———, for securing the principal sum of ——— dollars and interest in accordance with the covenants therein contained, which said mortgage is recorded in the registry of deeds for the said county of ———, book ———, page ———. The principal of said mortgage remains unpaid, but all interest thereon has been paid down to the ——— day of ———.

2. The grantee hereby covenants with the grantor that he, the grantee, his heirs, executors, administrators or assigns will pay all the principal, moneys and interest secured by and now due or hereafter to become due or payable under or by said mortgage, and will at all times hereafter keep indemnified the grantor, his estate and effects from all actions, claims and demands on account of the same and against.

In witness, etc.

Form 198.

Another Form of Same.

This indenture, etc.

To have and to hold, etc., subject to a certain mortgage dated

the ——— day of ———, and recorded, etc., on which the principal sum of ——— dollars is now owing, and the interest due and to become due from the ——— day of ——— last (which mortgage the said grantee hereby assumes and agrees to pay, the amount thereof forming a part of the consideration above mentioned).

In witness, etc.

Form 199.

Partnership, Property to be Held as Partnership Property.

This indenture, etc.

To have and to hold, etc., unto the said ——— and ———, their heirs and assigns, as joint tenants and partners, as part of their copartnership estate, so that after the death of either of them the said partners, the survivor of them, or the heirs, executors, or administrators, of such survivor, shall have full power, without the action or concurrence of the executors or administrators of the one of them so first dying, to sell, mortgage, incumber, lease, or otherwise dispose of the premises, or any part thereof, and to receive and give effectual discharges and acquittances for any moneys arising from any such disposition, and that every such disposition or receipt shall be absolutely binding upon all persons having or claiming any interest in the partnership estate.

In witness, etc.

Form 200.

Trustees, Deed To.

This indenture, etc.

To have and to hold, etc., unto the said parties of the second part as joint tenants, and not as tenants in common, their successors, heirs, and assigns forever, in trust, nevertheless, for the purposes following, that is to say, etc.

Form 201.

Another Form.

To have and to hold, etc., unto the said parties of the second part, their successors in said trust, and to their assigns, and to the survivor of them, and to the heirs and assigns of such survivor, but for the purposes and upon the express trusts following, that is to say, etc.

Form 202.

Another Form.

To have and to hold, etc., unto the said (*trustees*), the survivors, or survivor of them, their and his successors or successor, and their and his heirs and assigns forever, in trust, however, for the uses and purposes, and upon the terms, conditions, and agreements, herein set forth and declared.

Form 203.

Another Form.

To have and to hold, etc., unto the said parties of the second part, their heirs and assigns and successors in said trust, but for the uses and purposes following, that is to say, etc.

Form 204.

Deed to Corporation in Trust.

To have and to hold, etc., unto the said party of the second part, its successors in said trust and assigns, but upon the following express trust, that is to say, etc.

Form 205.

Deed to Trustees under a Will.

To have and to hold, etc., unto the said ——— and ———, their heirs and assigns and successors in said trust, as joint tenants, upon such of the trusts and subject to such of the provisions and powers contained in the said will of ———, concerning real estate thereby directed to be purchased, as are now capable of taking effect.

Form 206.

Deed by Mortgagor and Mortgagee of a Portion of the Mortgaged Premises.

This indenture, made the ——— day of ———, 19—, between A. B. of ———, party of the first part; C. D. of ———, party of the second part; and E. F. of ———, party of the third part, witnesseth:

Whereas by indenture dated the ——— day of ———, in the year 19—, and recorded with ——— county deeds, book ———, page ———, made between C. D., of the one part, and A. B. of the other part, the premises hereinafter described, together with other lands, were conveyed in mortgage to secure the payment of the sum of ——— dollars, with interest thereon, in accordance with terms of said mortgage;

And whereas the said C. D. has agreed to sell the premises hereinafter, described, free from all incumbrances, to the said E. F., for the sum of ——— dollars, and the said A. B. has agreed to join in the conveyance of the same on receiving the said sum of ——— dollars in part payment of his mortgage debt:—

Now this indenture witnesseth, that in consideration of the sum of ——— dollars, paid by the said E. F. to the said A. B. at the request and by the direction of the said C. D. the receipt whereof is hereby acknowledged, and also in consideration of one dollar paid by the said E. F. to the said C. D. the receipt whereof is hereby acknowledged, he, the said A. B. doth by these presents grant, bargain, sell, and convey, and he, the said C. D., doth by these presents grant, bargain, sell, and confirm, unto the said E. F. all that parcel of land, etc., together with the easements, privileges, and appurtenances to the said premises belonging, and all the estate, right, title, and interest of them, the said C. D. and A. B., therein. To have and to hold, etc.

Form 207.

Deed of Release by Assignees in Bankruptcy Electing not to Take Possession of Incumbered Land.

Whereas on the ——— day of ———, in the year 19—, A. B. of ———, in the county of ———, was adjudged a bankrupt on his own petition by the District Court of the United States for the District of ———, and C. D. and E. F., of said ———, attorneys at law, were duly chosen and appointed assignees of the estate and effects of said bankrupt; and whereas the parcel of land hereinafter described, forming a part of the said bankrupt's estate, was subject to a mortgage made by said bankrupt to G. H. of said ———, dated ——— day of ———, 19—, and recorded with ——— deeds, lib. ———, fol. ———, for the sum of ——— dollars and interest thereon; and whereas said land was unimproved and was of less value than the amount of the incumbrances thereon, and the said assignees, having regard to the interests of said estate, elected not to take possession thereof; and whereas the said bankrupt has released and conveyed said land to said G. H. (mortgagee), by deed dated ——— day of ———, 19—, and

recorded with ——— deeds, lib. ———, fol. ———, and has requested us, the said assignees, to release the same to the said, G. H.: Now, therefore, in consideration of the premises and of ——— dollars to us paid by the said G. H., the receipt whereof is hereby acknowledged, we do hereby release and forever quitclaim rights, easements, and appurtenances thereto belonging, to the unto the said G. H. all that pracel of land (*description*).

To have and to hold the above released premises, with the said ———, ———, heirs and assigns, to their use and behoof forever. In witness, etc.

Form 208.

Deed by Assignee of Bankrupt to Purchaser in Fee.

This indenture, made this ——— day of ———, 19—, between ——— of ———, assignee of the estate and effects of ———, late of ———, a bankrupt, of the first part; the said ———, late of ———, a bankrupt, of the second part; and ———, purchaser, of the third part, witnesseth:

Whereas a petition for adjudication in bankruptcy was on the ——— day of ——— filed in the District Court of the United States for the District of ——— against the said ———, who was thereupon adjudged a bankrupt; and the said party of the first part was chosen and appointed assignee of the estate and effects of said bankrupt;

And whereas the parcel of land and premises hereinafter described, forming part of the said bankrupt's estate, were on the ——— day of ——— offered for sale by public auction by the said assignee at ———, according to certain printed conditions of sale, at which sale the said ———, being the highest bidder was declared the purchaser of the said premises at the sum of ——— dollars;

And whereas the said bankrupt, at the request of the said assignee, has agreed to concur in these presents, in the manner hereinafter appearing:—

Now this indenture witnesseth, that in consideration of the sum of ——— dollars paid by the said ——— to the said assignee, the receipt whereof is hereby acknowledged, the said ———, assignee as aforesaid, doth hereby remise, release, and forever quitclaim, and the said bankrupt, in consideration of one dollar to him paid, the receipt whereof is hereby acknowledged, doth remise, release, and confirm, unto the said ——— all that parcel of land, etc. To have and to hold, etc.

Form 209.

Deed to Three Persons Purchasing as Tenants in Common.

Whereas the purchasers have provided the purchase money in the shares and proportions hereinafter stated ———, and have requested that the property shall be conveyed to them in the shares hereinafter declared:

Now in consideration of ——— dollars paid to the vendor by the purchasers in equal shares (*or* in the proportions hereinbefore mentioned), the receipt whereof the vendor hereby acknowledges, the said vendor hereby conveys unto the purchasers (***land described***). To hold the same to the said purchasers in equal shares as tenants in common (***or, if in unequal shares state the proportion***).

Form 210.

Deed by one Tenant in Common or Joint Tenant to Another.

(*Recite tenancy in common or joint tenancy*:)

Now, in consideration of ——— dollars paid by the grantee to the grantor, the receipt whereof the vendor hereby acknowledges, the vendor hereby, as tenant in common with the grantee, grants and conveys (*but if a joint tenant,* releases and conveys) unto the grantee all that share, estate, and interest of the grantor of and in (*land described*). To hold the same unto the grantee in fee simple to the intent that the purchaser may henceforth stand seized of the entirety of the said premises, freed from any estate or right of the grantor therein.

Form 211.

Deed by Tenants in Common or Joint Tenants.

(*Recite names of parties and their tenancy in common or as joint tenants in equal shares*:)

Now, in consideration of ——— dollars paid by the purchaser to the owners, the receipt whereof, the owners hereby acknowledge, each of them, the said owners, so far as concerns his own share, estate or interest in the land and premises hereby conveyed, but so as to make each of them liable in respect of any breach of implied covenants to the extent of one-half only of the damages therefor, hereby conveys unto the purchaser (***describing land***).

Form 212.

Deed to Sub-Purchaser of Part of the Property.

Whereas A. B., hereinafter called the owner, lately agreed to sell to C. D., hereinafter called the purchaser, the land hereinafter described, with other land, but no conveyance thereof has been executed of the part of the land herein described;

And whereas the purchaser has agreed with E. F., hereinafter called the sub-purchaser, to sell him the parcel of land hereinafter described for the price of ——— dollars, and it had been arranged and agreed that the said sum shall be paid to the owner in part discharge of the purchase money payable to him by the purchaser, and that the owner shall join in these presents in the manner hereinafter appearing.

Now in consideration of ——— dollars paid by the sub-purchaser to the owner by the direction of the purchaser, the receipt and payment whereof the owner and the purchaser hereby respectively acknowledge, the owner as beneficial owner hereby conveys, and the purchaser hereby ratifies and confirms, unto the sub-purchaser all that piece or parcel of land (*describing it*).

Form 213.

Affidavit by Grantor that He Has Title and Possession.

STATE OF CALIFORNIA, City and County of SAN FRANCISCO, ss:

I, A. B., of ———, in county of ———, and state of ———, being duly sworn, do say that the property described in the deed to C. D. herewith delivered has been held by deponent and preceding owners for the period of more than ——— years last past and that said possession has been peaceable and undisturbed, and that the title has never been disputed or questioned to my knowledge or belief; that no person has any valid contract for the purchase of said premises unknown to G. H., attorneys for the grantee, or any part thereof, nor does deponent know any facts by reason of which said possesion of or title to said premises, or any part thereof, might be disputed or questioned, or by reason of which any claim to any part of said property, or to an undivided interest therein, adverse to deponent, might be alleged, set up or made; that there is no suit or proceeding pending in any court or elsewhere affecting said premises or any part thereof; that the said premises are free and clear of all taxes, incumbrances, or liens by attachment, notice, mortgage, decree, judgment, or by statute, or by reason of any proceedings in any court, state or na-

tional, or filed in the office of the clerk of any county or court in this state, and of all other liens of every nature and sort whatsoever, recorded or unrecorded, except as follows:—(*specifying them*).

Deponent further says that there are no judgments, decrees, attachments, or orders of any court or officer for the payment of money against him individually or in connection with any other party, unsatisfied or not cancelled of record in any of the courts or before any officer of the United States or of this state, and that no proceedings in bankruptcy have ever been instituted by or against him in any court, or before any officer of any state, or of the United States.

Deponent further says that he is now in possession as sole owner of the said premises; which are the premises described in the deed to said C. D.; and he further says that he resides at ———, that he is a citizen of the United States of America, of the age of ——— years and upwards, and is married to ———, who is the same person who has executed the same deed with deponent, and who is over the age of twenty-one years.

Deponent further says that all the statements and representations in this affidavit contained are made in order to induce the said grantee to pay to deponent the sum of ——— dollars.

Subscribed and sworn before me this ——— day of ———, 19—.

Form 214.

Deed of right to place Footings of a Wall partly in land of adjacent Proprietor.

Indenture made the ——— day of ——— between A. B., of the one part, and C. D., of the other part:

Whereas the said C. D. is the owner in fee simple of land marked and delineated on the plan hereto annexed, which is bounded on one side by land of which the said A. B., is the owner in fee simple;

And whereas the said C. D. is desirous of erecting a building with a wall which will be the boundary between the lands of said adjoining owners;

And whereas the footings or foundations thereof must be laid partly upon the land of the said A. B., it has been mutually agreed that said C. D. shall have the right so to lay said footings or foundations for the consideration herein expressed.

Now this indenture witnesseth that in pursuance of said agree-

ment and in consideration of ——— dollars paid by said C. D., the said A. B. hereby grants and conveys unto said C. D., his heirs and assigns, full liberty and authority to enter upon his said land and to excavate the same to the necessary depth and width along the said boundary line betwen said respective lands, and to lay and forever to keep and maintain in such excavation at a depth of not less than ——— feet from the surface all such footings or foundations of concrete, rock, brick or other substance proper for the foundation of such building. And also to erect scaffolding on the land of said A. B. and to use such scaffolding during the erection of such wall for all usual building purposes. And also from time to time, by means of a cradle along from the top of said wall over the land of said A. B., and by workmen standing on said land of ———, to repair and point said wall.

And said C. D., hereby covenants with the said A. B. that he, his heirs or assigns, will, in making such excavation and erecting such wall, cause as little damage as possible to the land of said A. B., and will fill up such excavation, remove the scaffolding, and restore the surface of the land to its present condition, so far as it is possible to do so. And also will, after repairing or pointing the said wall from time to time, carefully remove all debris which may have fallen onto said land in the course of such repairing and pointing, so as to leave the land in its usual condition.

In witness, etc.

Form 215.

Grant of Easement of Light.

Indenture made the ——— day of ——— between A. B. of the one part and C. D. of—of the other part:

Witnesseth that in consideration of the sum of ———dollars paid by the said C. D., to the said A. B., the receipt whereof is hereby acknowledged, the said A. B. hereby grants and conveys to the said C. D. and his heirs full and free right to the uninterrupted access and enjoyment of light over and across that piece of land situate in the city of ——— and county of ——— containing ——— square feet, more particularly described, marked and delineated in the plan hereto annexed, to the existing windows of the dwelling-house recently erected upon land of the said C. D. adjoining said land of the said A. B. on the ——— side thereof. To hold the said easement unto the said C. D., his heirs and assigns forever.

In witness, etc.

Form 216.

Deed Granting Access to Light and Air.

Indenture made, etc.

Grants and conveys, etc. (*land described*).

Together with the right to the free and unimpeded access of light and air to all such windows as the grantee may think fit to open on the south side of any building now erected or hereafter to be erected on the land hereby conveyed.

Form 217.

Grant of Easement of Way over a Private Road.

Indenture made the ——— day of ——— between A. B., of the one part, and C. D. of ———, of the other part.

Whereas the said A. B. is seized of an estate in fee simple in possession free from incumbrance of a parcel of land situate in ———, and shown on the plan hereto annexed, across which there is a private road shown on said plan by dotted lines extending from the highway to a lane known as ——— lane;

And whereas the said C. D. grantee is seized in fee simple of a piece of land containing ——— acres or thereabouts, also shown on said plan;

And whereas the said A. B. has agreed, in consideration of the sum of ——— dollars to be paid by said C. D., to grant an easement or right of way over said private road:

Now this indenture witnesseth that in pursuance of said agreement and in consideration of the sum of ——— dollars paid by the said C. D. to said A. B., the receipt whereof is hereby acknowledged, the said A. B. hereby grants and conveys unto the said C. D., his heirs and assigns, the full and free right for him and them, his and their tenants, servants, visitors and licensees, in common with all others having the like right at all times hereafter, with or without horses, cattle, carts, carriages or other vehicles, for all purposes connected with the use of said ——— grantee's land, to pass and repass along said private road between the points before named: To hold said easement to the said C. D., his heirs and assigns, as appurtenant to said land of C. D.

In witness, etc.

Form 218.

Easement of way Appurtenant to a single Dwelling-house and Grounds.

Now this indenture witnesseth that in pursuance of said agreement, and in consideration of the sum of ——— dollars now paid by the said grantee to the said grantor, the said grantor hereby grants and conveys to the said grantee, his heirs and assigns, full and free right and liberty for him and them, his and their tenants, servants and licensees, in common with all other persons having the like right at all times hereafter on foot or on horseback or in vehicles, but not with cattle, sheep, pigs or other animals, to pass and repass along said private road from said highway to said lane, for all purposes connected with the use and enjoyment of the said grantee's premises as a single private dwelling-house, but not for any other purpose. To hold the said right of way hereby granted unto the said grantee and his heirs as appurtenant to said dewelling-house and grounds.

In witness, etc.

Form 219.

Agreement between Householder and Adjoining Land-owner as to a Right to Eavesdrop.

Agreement made this ——— day of ——— between A. B., of the one part, and C. D. of the other part.

Whereas the eaves of the dwelling-house of said A. B. overhang the land of the said C. D., and water from the roof of said householder falls upon the land of said adjoining landowner it is hereby agreed that the overhanging of the eaves of said dwelling-house shall be deemed to be, with the permission of said adjoining landowner, and the falling of the water from the eaves upon the land of said adjoining owner shall be deemed to have been continued with the express license and permission of said adjoining owner, to the extent that neither the owner of the dwelling-house nor any person claiming under or through him, shall acquire any right of eavesdrop or any easement or other right in respect of said overhanging eaves and said permission and license shall not by the lapse of time or otherwise ripen into a right or easement.

The owner of said dwelling-house shall compensate the said adjoining landowner in respect of any damage or injury that may at any time hereafter be done to the land of said adjoining owner, his heirs or assigns, by reason of said overhanging eaves. The owner of the dwelling-house shall within thirty days after the

service of a notice in writing on him by said adjoining landowner, so requiring, remove the overhanging eaves.

In witness, etc.

Form 220.

Grant of a Footway as a Substitute for a Discontinued Path.

This indenture made this ——— day of ———, A. D. 19—, between A. B. of the party of the first part and C. D., the party of the second part, witnesseth:

Whereas the said A. B. is seized in fee simple of the land marked and delineated on the plan hereto attached and made a part hereof, across which there runs a path, hereinafter called the old path, as shown by dotted lines on said plan:

And whereas the said C. D. is seized in fee simple of a parcel of land shown on said plan, appurtenant to which is a right of foot way over the said old path;

And whereas the said A. B. has agreed, in consideration of the said C. D. releasing his said right of way over the said old path, to grant to him a right of way over a new path shown on said plan:

Now this indenture witnesseth that in pursuance of said agreement, and in consideration of the release on the part of C. D., the said A. B. hereby grants to the said C. D. full and free privilege and liberty, in common with all other persons entitled to use the same, of the right of passing and repassing on foot only at all times over the said new path for any purpose connected with the use and enjoyment of the lands of said C. D. To hold said right of way to the said C. D., his heirs and assigns, as an easement appurtenant to said lands.

In pursuance of said agreement the said C. D. hereby releases unto the said A. B. all right or easement of way over the said old path as appurtenant to his land or otherwise. To hold said right hereby released unto said A. B., his heirs and assigns, so that the same be extinguished.

In witness, etc.

Form 221.

Grant of Right of Way to an Interurban Railway Company.

This indenture, made this ——— day of ———, 19—, between A. B. of ———, hereinafter called owner, and C. D. of ———, hereinafter called the interurban company, witnesseth:

In consideration of ——— dollars, paid by the said interurban

company, the receipt whereof is hereby acknowledged, the owner does hereby grant, bargain, sell and convey unto said interurban company, its successors and assigns forever, a right of way in and over that certain strip of land described as follows: (Right of way to be described with metes and bounds) for the said interurban company, its successors and assigns and its servants, agents and licensees at all times to freely pass and repass on the same, to build, construct, complete, operate and run an interurban railway on and over said lands of vendor as aforesaid, in whatsoever manner and according to whatsoever regulations said interurban company may devise or adopt.

In witness, etc.

Form 222.

Grant of Right of Sewage.

Indenture made this ——— day of ——— between A. B. of the one part and C. D. of the other part:

Whereas the said grantor is seized in fee simple of a parcel of land situate at ——— in the county of ———, and the grantee is seized in fee simple of a parcel of land adjoining the same.

And whereas the grantor has constructed a sewer, or drain, beneath the surface of his land from his dweling-house to the public sewer, and has agreed with the grantee to grant to him the right to use his said sewer or drain as hereinafter set out for the consideration hereinafter mentioned:

Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of ——— dollars now paid by the said grantee, the said grantor hereby grants and conveys unto the said grantee, his heirs and assigns forever, the free right of using the said sewer or drain for the passage of sewage water and soil from the grantee's land and house adjoining the grantor's said land: And for this purpose the grantee shall make and forever hereinafter keep and maintain such connection with the grantor's said sewer or drain as may be reasonable and proper, making good, nevertheless, at his own cost and expense, all damage which may be caused to the surface of the grantor's parcel of land in making such connections, repairs and maintenance.

In witness, etc.

Form 223.

Grant to Erect Telephone Poles.

This agreement, made this ——— day of ———, 19—, between

A. B. of ———, hereinafter called the telephone company, and C. D. of ———, hereinafter called the owner, witnesseth:

In consideration of the payment by said telephone company of the sum of ——— dollars per pole for each and every pole of a telephone line to be located by said telephone company upon the following described premises and real estate (here insert description), said owner does hereby grant unto said telephone company, its successors and assigns, the right, privilege and authority to construct, operate and maintain its lines of telephone, including the necessary poles, wires and fixtures, over, across and upon said above described property; and also grant unto said company, its successors and assigns, the right, privilege and authority to cut down or trim any trees along the said lines necessary to keep wires clear by at least ——— inches; also to put in place necessary guy-wires and brace-poles and to attach guy-wires to trees along said line; and also said telephone company is fully authorized and empowered at all reasonable times to enter upon said premises for the purpose of constructing its said lines on and over the same as hereinabove provided.

In witness, etc.

Form 224.

Grant of Right to take Water from Well.

Indenture made the ——— day of ——— between A. B. of the first part and C. D. of the second part.

Whereas said party of the first part is the owner in fee simple of a parcel of land in the town of ——— in the county of ——— on which he has sunk a well, and has agreed with the party of the second part to sell to him the easement hereinafter described:

Now this indenture witnesseth as follows:

In consideration of ——— dollars paid by the party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part hereby grants and conveys unto said adjacent owner, his heirs and assigns, full and free right and authority by himself or themselves, his or their servants or agents to enter upon the land of the party of the first part and to pass and repass by a footpath to and from said well and to take water from the well pump for all domestic purposes to the use of the said adjoining owner, his heirs and assigns forever, or at the option of said adjoining owner, his heirs or assigns, he or they have the right and authority to lay a pipe from said well to the house on the land of said adjoining owner and by a pump or other means to draw water from said well for all domestic purposes in common with the well owner, his heirs and assigns, using

the same for domestic purposes. The said well-owner hereby covenants with said adjacent owner, his heirs and assigns, that he will keep and maintain the well in good order and free from contamination.

In witness, etc.

Form 225.

Grant of Right of Way with Obligation to Share in Expense of Maintaining Same.

This indenture made, etc.

Grants and conveys, etc.

Together with a right of way at any and all times and for any and all purposes with or without vehicles and animals to and from the land hereby conveyed, or any part thereof, and all or any buildings thereon, over and along the road ——— feet wide colored ——— on said plan, subject to the payment of a just and fair proportion of the cost and expense of maintaining and keeping such road in repair.

Form 226.

Deed Giving Right to Use Sewers.

This indenture, etc.

[After granting words.]

Together with the right to enter and use all sewers and drains, now or hereafter made or passing under or along any of the streets adjoining said land, or in or upon the adjoining premises belonging to the vendor.

In witness, etc.

Form 227.

Reserving to Grantor Right to Lay Down Sewer Pipes.

This indenture, etc.

There is hereby excepted and reserved to the grantor, his heirs and assigns, the right to lay down and construct at any time, sewers, drains and water pipes, in and upon the above described property and to keep and maintain the same for the convenience of the other land and buildings belonging to the grantor and adjoining the aforesaid conveyed property.

Form 228.

Common Drains and Cesspools to Belong to Grantor.

This indenture, etc.

It is expressly agreed that the common drains and cess pools shall be and remain the property of the grantor and the grantee does hereby covenant and agree with the grantor, his heirs and assigns, that he, his heirs and assigns, will not build over or in any manner alter or damage the said drains and does also covenant that he will allow to the grantor the full right of entry at all reasonable times for the purpose of repairing or constructing the said drains whenever it may become necessary so to do.

Form 229.

Restriction of Buildings to Private or Professional Residence.

This indenture, etc.

That no building to be erected on the land herein granted and conveyed shall be used for other purposes than as a private dwelling-house, and no such building shall be used as a block of flats, or as a tenement-house.

In witness, etc.

Form 230.

Only One Dwelling-house to be Erected.

This indenture, etc.

No more than one detached dwelling-house (*or* two semi-detached houses) shall be built or erected on any one lot, and every such dwelling-house shall front the road adjoining said lot, and shall in all respects conform to the building line of the houses heretofore erected on said road.

In witness, etc.

Form 231.

Building to be Erected by Grantee.

This indenture, etc.

The grantee shall, within six months after the date of this deed, build, erect and complete a dwelling-house on said lot, and shall thereafter keep and maintain the same in substantial repair. Such dwelling-house shall be built to the satisfaction in all re-

spects of the grantor's architect (*or* shall be built in accordance with plans and elevations to be submitted to and approved by such architect before the work is commenced).

In witness, etc.

Form 232.

Erection of Temporary Buildings Prohibited.

This Indenture, etc.

There shall not at any time be erected or placed on any of said lots any temporary building, with the exception of sheds or workshops for use in connection with the building of permanent buildings which shall be in course of construction upon such lots.

Form 233.

Trade Buildings Prohibited.

This indenture, etc.

The grantee agrees, etc.

That said premises or any buildings to be erected thereon shall not at any time be used or occupied for the purpose of any trade, manufacture, or business of any description, or as a school, hospital, or other charitable institution, or as a hotel, or place of public resort.

Form 234.

No Offensive Business to be Carried on.

This indenture, etc.

The grantee agrees, etc.

That no building shall at any time be erected on the aforesaid described property for manufacturing purposes, and that no manufacture or work of an offensive, dangerous, or noisy kind shall be conducted or carried on upon the same, nor shall anything be done or permitted thereon, which may be or become an annoyance or nuisance to the said grantor, his heirs or assigns, or to the neighborhood.

In witness, etc.

Form 235.

Another Form—No Offensive Trade to be Carried on.

That no noxious or offensive trade shall be conducted or car-

ried on upon said premises, or any trade or business which may be offensive or objectionable to the neighborhood.

Form 236.

Prohibition of Sale of Intoxicating Liquors.

That no building to be erected on said land shall at any time be used for the sale of any malt, vinous, alcoholic or intoxicating liquors, and no building shall at any time be used or occupied as an inn or hotel.

Form 237.

Building Lines to be Observed.

This indenture, etc.

The said grantee does covenant and agree that the front wall of any house or building to be erected on said premises shall be in a line with the building line marked on said plan, ——— feet distant from said street and parallel with said street; and no building or erection of any kind, excepting bay windows, verandas, porches, or structures of a like character shall be erected on any portion of the said premises which lies between the building line and the street marked on said plan.

In witness, etc.

Form 238.

Windows not to Overlook.

This indenture, etc.

The said grantee, etc.

That no window, door, or opening shall at any time within five years from the date hereof be made on the ——— side of any building which may be erected on said premises, so that the same will overlook the dwelling-house and premises now in the occupation of the grantor.

Form 239.

Buildings to be Placed Back from Street.

This indenture, etc.

The said grantee doth hereby for himself, his heirs and assigns, covenant to and with the said grantor, his heirs, executors and

administrators that no building except a boundary fence not more than ——— feet high, made of materials and a design to be approved by the said grantor, his heirs or assigns, shall at any time be erected on the said premises within ——— feet of the street adjoining the same.

In witness, etc.

Form 240.

Houses to be Erected at Certain Cost.

This indenture, etc.

And the said grantee doth hereby for himself, his heirs and assigns, covenant with the said grantor, his heirs, executors, and administrators, that he will, within two years from the date of these presents, at his own cost, and expense and under the inspection and to the satisfaction of the architect or surveyor of the said grantor, his heirs or assigns, erect and finish in a good, substantial, and workmanlike manner, upon the tract of land hereby conveyed, one dwelling-house of the cost of five thousand dollars, at least, exclusive of any stable or outbuildings.

In witness, etc.

Form 241.

Only One House to be Erected.

This identure, etc.

The said grantee in consideration of the premises and as a condition for this conveyance does agree that one dwelling-house only, of the cost of at least ——— dollars, and in all respects according to plans and elevations to be approved of by the architect of the said grantor, his heirs or assigns, shall be erected on the said premises; but stabling or other outbuildings, according to plans and insituations to be approved by the said architect, may also be erected thereon.

In witness, etc.

Form 242.

Grantee to Fence Land.

The grantee shall, within six months after the date of this deed, fence in the land described on all sides thereof, and shall forever keep said land so fenced with good and sufficient fences.

Form 243.

Sand or Gravel not to be Dug.

This indenture, etc.

It is agreed, etc.

That no sand or gravel shall at any time be excavated or dug out of the said property, except for the purpose of laying the foundations of buildings to be erected on the same, or for use in erecting such buildings, or improving the gardens or grounds thereof.

In witness, etc.

Form 244.

Deed Giving Grantor Right to Waive or Alter Restrictions.

This indenture, etc.

The grantor reserves to himself, and those deriving title under him, the right to sell, lease or otherwise deal with any lots unsold at the present sale, either subject to or free from all or any of the stipulations or restrictions imposed by this conveyance, or by any deed of any other lot sold at this sale or at any sale of lots heretofore made of the grantor's neighborhood property, meaning and intending to reserve to himself the right to release, waive or modify, either wholly or in part, all or any of such stipulations, provisions or restrictions. The exercise of said right in relation to any lot or lots shall not in any manner release the grantor of any other lot from any of the stipulations, provisions or restrictions imposed upon such other lot, nor give to any such purchaser any right of action against the grantor or any other person.

Form 245.

Infant Grantor to Convey on Reaching Majority.

Whereas one of the grantors who is absolutely entitled in possession to (one-quarter) share of the property above described is an infant, aged ——— years, the other grantors before named jointly and severally covenant with the purchaser that the said infant shall, when he shall have attained the age of twenty-one years, execute a good and sufficient conveyance of the property above described to the grantee, and the grantee shall pay (one-quarter) part of the purchase money to two trustees, appointed by the grantee and the grantors, to be held by them on trust to deposit the same in a savings bank, and such sum and the interest and ac-

cumulations thereon shall, if the said infant shall execute the conveyance within six months after attaining the age of twenty-one years, belong absolutely to such infant; but if he shall not so execute the said conveyance, the same shall belong absolutely to the grantee, who shall in addition be entitled to a sum of ——— dollars, as liquidated damages for breach of this covenant on the part of the grantors.

Form 246.

Division Walls Shall be Party Walls.

This indenture, etc.

All division walls between the several lots shall be party walls, built as to one equal half in width, thereof upon each of the respective adjoining lots and shall belong to the respective adjoining owners in equal moieties. All such walls shall be built of brick upon proper foundations with projecting chimney breasts, and shall be of a thickness of ——— inches at least to the height of ——— feet above the ground, and of ——— inches at least above that height. The owner who builds such walls shall be repaid by the adjoining owner one equal half of the value of all such walls built by him, which shall henceforth be maintained and repaired at the joint expense of the two adjoining owners.

Form 247.

Party Walls Conveyed in Undivided Moieties.

Division walls shall be considered party walls, and the conveyance of each lot separated from any other lot by a party wall shall include one equal undivided moiety of so much in length of such wall as is co-terminous with the respective lots.

Form 248.

Release of Easement by Indorsement.

This indenture made the ——— day of ——— between A. B. of the one part, and C. D., of the other part.

Whereas the said parties are respectively seized in fee as hereinabove set out.

And whereas for the consideration hereinafter mentioned the said C. D. has agreed to release and abandon to the said A. B. the within granted easement.

Now this indenture witnesseth that in pursuance of said agree-

ment and in consideration of the sum of ——— dollars now paid by the said A. B. to said C. D., the receipt whereof is hereby acknowledged, the said A. B. hereby releases and abandons unto the said C. D. all that certain easement (describing it) which by the within indenture was granted to said C. D., to the intent that such right shall henceforth end cease and determine.

In witness, etc.

CHAPTER III.

DEEDS IN USE IN THE VARIOUS STATES.

F. 249. Alabama. Warranty deed.
250. Same. Quitclaim deed.
251. Alaska.
252. Arizona.
253. Arkansas, statutory form of deed, relinquishing dower.
254. California. Grant, bargain and sale deed.
255. Same. Covenant of warranty.
256. Quitclaim deed.
257. Same. Deed of gift.
258. Same. Statutory form of deed.
259. Colorado. Warranty deed.
260. Same. Quitclaim deed.
261. Delaware. Warranty deed.
262. District of Columbia. Warranty deed.
263. Same. Covenant for further assurance.
264. Same. Statutory form of simple deed.
265. Same. Deed by husband and wife.
266. Same. Trustee's deed under a decree.
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268. Florida. Covenants.
269. Same. Declaration of wife in release of dower.
270. Same. Statutory form of warranty deed.
271. Georgia. Warranty deed.
272. Hawaii.
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F. 274. Illinois. Warranty deed.
275. Same. Quitclaim deed.
276. Same. Stututory form of warranty deed.
277. Same. Statutory form quitclaim deed.
278. Iowa. Warranty deed.
279. Same. Quitclaim deed.
280. Same. Statutory form quitclaim deed.
281. Same. Statutory form deed in fee simple without warranty.
282. Same. Statutory form, deed in fee with warranty.
283. Indiana. Statutory form, warranty deed.
284. Same. Statutory form quitclaim deed.
285. Kansas. Warranty deed.
286. Same. Statutory form, warranty deed.
287. Same. Statutory form, quitclaim deed.
288. Kentucky. Warranty deed.
289. Maine. Warranty deed.
290. Same. Quitclaim deed.
291. Maryland. Warranty deed.
292. Same. Statutory form, deed in fee simple.
293. Same. Statutory form, where married woman is a party.
294. Same. Statutory form. Conveyance of estate for life.

F. 295. Same. Statutory form. Executor's deed.
296. Same. Statutory form, assignment of leasehold.
297. Massachusetts. Warranty deed.
298. Same. Quitclaim deed.
299. Michigan. Warranty deed.
300. Same. Deed.
301. Same. Quitclaim deed.
302. Minnesota. Warranty deed, commonly used.
303. Same. Warranty deed.
304. Same. Quitclaim deed.
305. Mississippi. Warranty deed.
306. Same. Statutory form of warranty deed.
307. Same. Statutory form, deed of sheriff.
308. Same. Deed of administrator, executor, guardian, master or commissioner.
309. Missouri. Statutory form of general warranty deed with covenants.
310. Montana. Statutory form of deed.
311. Same. Warranty deed generally used.
312. Nebraska. Warranty deed.
313. Same. Quitclaim deed.
314. Nevada.
315. New Hampshire. Warranty deed.
316. Same. Quitclaim deed.
317. New Jersey. Statutory form of deed.
318. Same. Warranty deed generally used.
319. New Mexico. Warranty deed.
320. Same. Quitclaim deed.
321. New York. Statutory form of deed containing full covenants.
F. 322. Same. Executor's deed.
323. North Carolina. Warranty deed.
324. Same. Quitclaim deed.
325. North Dakota. Statutory form of deed.
326. Same. Warranty deed.
327. Ohio. Warranty deed.
328. Same. Quitclaim deed.
329. Oklahoma. Statutory form of deed.
330. Oregon. Warranty deed.
331. Same. Quitclaim deed.
332. Pennsylvania. Warranty deed.
333. Same. Quitclaim deed.
334. Same. Statutory form.
335. Same. Form of sheriff's deed.
336. Rhode Island. Warranty deed.
337. Same. Quitclaim deed.
338. South Carolina. Statutory form of warranty deed.
339. South Dakota. Statutory form of deed.
340. Same. Warranty deed.
341. Same. Quitclaim deed.
342. Tennessee. Statutory form and in fee with warranty.
343. Same. Statutory form, covenants of seizin, possession and special warranty.
344. Same. Statutory form of quitclaim deed.
345. Same. Usual form of covenants.
346. Texas. Statutory form of warranty deed.
347. Utah. Statutory form of warranty deed.
348. Same. Statutory form quitclaim deed.
349. Vermont. Warranty deed.
350. Same. Quitclaim deed.

F. 351. Virginia and West Virginia. Warranty deed.
351a. Same. Statutory forms.
352. Washington. Statutory form of warranty deed.
352a. Same. Statutory form, bargain and sale deed.
353. Same. Statutory form of quitclaim deed.
354. Same. Warranty deed in common use.
F. 354a. Same. Warranty deed of a corporation.
355. Wisconsin. Statutory form warranty deed.
356. Same Statutory form, quitclaim deed.
357. Same. Warranty deed generally used.
358. Same. Quitclaim deed generally used.
359. Wyoming. Warranty deed.

Form 249.

ALABAMA: *Warranty Deed.*

Know all men by these presents that I, ——— of ———, in the state of ———, for and in consideration of the sum of ——— dollars to me in hand paid by ——— of ———, the receipt whereof I do hereby acknowledge, have granted, bargained and sold and by these presents do hereby grant, bargain, sell, and convey unto the said ——— his heirs and assigns, the following described real estate, all that situated in said ———, to wit (*description*).

To have and to hold the afore granted premises, to the said ———, his heirs and assigns, forever.

And I do covenant with the said ———, his heirs and assigns, that I am lawfully seized in fee of the afore granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same to the said ———, his heirs and assigns, and that I will warrant and defend the said premises to the said ———, his heirs and assigns, forever against the lawful claims and demands of all persons.

In witness whereof, I, ———, have hereunto set my hand and seal this ——— day of ———, 19—.

Form 250.

ALABAMA: *Quitclaim Deed.*

Know all men by these presents that I, ——— of ———, in the state of ———, in consideration of the sum of ——— dollars to me in hand paid by ——— of ———, the receipt whereof is hereby acknowledged, do remise, release, quitclaim, and convey to the said ——— all right, title, interest and claim in and to the

following described land, situate in ——— and the state of Alabama.

To have and to hold the granted premises unto the said ———, and his heirs and assigns forever.

Form 251.

ALASKA TERRITORY: *California Forms may be Used.*

Form 252.

ARIZONA: *Equivalent Forms, Altered to Suit Circumstances, May be Used.*

1. For the consideration of ——— dollars, I hereby quitclaim to all my interest in the following tract of real estate (*describing it*).

2. For the consideration of ——— dollars I hereby convey to A. B. the following tract of real estate (*describing it*).

3. The same as the last preceding form, adding the words "and I warrant the title against all persons whomsoever" (*or other words of warranty, as the party may desire*).

Form 253.

ARKANSAS: *Warranty Deed Relinquishing Dower, Statutory Form.*

Know all men by these presents: That we ——— and ——— his wife, for and in consideration of the sum of ——— dollars to us paid by ———, do hereby grant, bargain, sell and convey unto the said ——— and unto ——— heirs and assigns forever, the following lands lying in the county of ——— and state of Arkansas, to wit: (*Insert correct description.*) To have and to hold the same unto the said ——— and unto ——— heirs and assigns forever, with all appurtenances thereunto belonging. And ——— hereby covenant with said ——— that ——— will forever warrant and defend the title to the said lands against all claims whatsoever. And I, ——— wife of the said ———, for and in consideration of the said sum of money, do hereby release and relinquish unto the said ——— all my right of dower and homestead in and to the said lands.

Witness our hands and seals on this ——— day of ———, 19—.

Form 254.

CALIFORNIA: *Bargain and Sale Deed.*

This indenture, made this ——— day of ———, A. D. 19—, between ——— the party of the first part, and ——— the party of the second part. Witnesseth: That the said party of the first part, for and in consideration of the sum of ——— dollars, ——— of the United States of America, to ——— in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all the certain lot, piece or parcel of land situate, lying and being in the ——— county of ———, state of ———, and bounded and particularly described as follows, to wit: Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered in the presence of ———.

Form 255.

CALIFORNIA: *Covenant of Warranty.*

And the said party of the first part, and his heirs, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

Form 256.

CALIFORNIA: *Quitclaim Deed.*

Instead of words of grant, bargain, etc., use, has remised released and forever quitclaimed, and by these presents does remise, release and forever quitclaim, unto the said party of the second part, and to ———. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or

in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, ——— property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

Form 257.

CALIFORNIA: *Deed of Gift.*

This indenture, etc.

Witnesseth: That the said party of the first part, for and in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, as also for the better maintenance, support, protection and livelihood of the said party of the second part, does by these presents give, grant, alien and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the certain lot, piece or parcel of land, situate, lying and being in the ——— county of ———, state of ———, and bounded and described as follows, to wit:

Form 258.

CALIFORNIA: *Statutory Form of Deed.*

I, ———, grant to ——— all that real property situated in ——— county, state of California, bounded (*or described*) as follows (*here insert description*). Witness my hand this ——— day of ———, 19—.

Form 259.

COLORADO: *Warranty Deed.*

This indenture, made the ——— day of ——— A. D. 19— between ——— of ———, party of the first, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom has granted, bargained, sold, remised, released, conveyed, aliened, and confirmed and by these presents does grant, bargain, sell, remise, release, convey, aliene, and confirm, unto the said party of the second part,

and to his heirs and assigns forever, all that parcel of land, situate, etc.; together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said ——— party of the first part, for himself and his heirs, executors, and administrators, doth covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances, of what kind or nature soever; and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person and persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend. In witness, etc.

Form 260.

COLORADO: *Quitclaim Deed.*

This indenture, made this ——— day of ——— 19—, between ——— of ———, in the county of ——— and state of ——— party of the first part, and ——— of ———, in the county of ——— and state of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell convey, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which said party of the first part has in and to the following described lot, piece, or parcel of land, situated in the county of

——— and state of ———, known and described as follows, to wit, etc.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

In witness, etc.

Form 261.

DELAWARE: *Warranty Deed.*

This indenture, made the ——— day of ———, A. D. 19—, between ——— of ——— and ——— his wife, of the one part, and ——— of ———, of the other part, witnesseth, that the said ——— and ——— his wife, for and in consideration of the sum of ——— dollars lawful money, to them paid by the said ——— before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these presents do grant, bargain, sell, release, and confirm unto the said ———, his heirs and assigns, all that, etc., together with all and singular the buildings, improvements, ways, streets, alleys, passages, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, claim, and demand whatsoever, of them the said ——— and ——— his wife, at law or in equity, in and to the same.

To have and to hold the said property and lot or piece of ground above described, hereditaments, and premises hereby granted or mentioned and intended so to be, with the appurtenances, unto the said ———, his heirs and assigns, to and for his and their only proper use and behoof forever.

And the said ———, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said ———, his heirs and assigns, that he, the said ——— and his heirs, all and singular the hereditaments and premises hereby granted or mentioned and intended so to be, with the appurtenances, unto the said ———, his heirs and assigns, against himself, the said ——— and his heirs, and against all and every other person and persons whomsoever, lawfully claiming or to claim by, from, or under him, them, or any of them, shall and will warrant and forever defend by these presents. In witness whereof the

said parties have hereunto interchangeably set their hands and seals. Dated the day and year first above written.

Form 262.

District of Columbia.

This indenture made the ——— day of ——— A. D. 19— between ——— of ——— and ——— his wife, of the one part, and ——— of ——— of the other part, witnesseth, that the said——— and ——— his wife, for and in consideration of the sum of ——— dollars lawful money, to them paid by the said ——— before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, and confirmed, and by these present do grant, bargain, sell, release, and confirm unto the said ———, his heirs and assigns, all that etc., certain real property etc., together with all and singular the buildings, improvements, ways, streets, alleys, passages, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto appertaining or belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever, of them the said ——— and ——— his wife, at law or equity in and to the same.

To have and to hold the said property and lot or piece of ground above described, hereditaments and premises, hereby granted or mentioned and intended so to be, with the appurtenances, unto the said ——— his heirs and assigns, to and for his and their only proper use and behoof forever.

And the said ———, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said ——— his heirs and assigns, that he the said ——— and his heirs, all and singular the hereditaments and premises hereby granted or mentioned and intended so to be, with the appurtenances, unto the said ———, his heirs and assigns against himself, the said ——— and his heirs and against all, and every other person and persons whomsoever, lawfully claiming or to claim by, from, or under him, them, or any of them, shall and will warrant and forever defend by these presents.

In witness whereof, etc.

Form 263.

DISTRICT OF COLUMBIA: *Covenant for Further Assurance.*

A Covenant for further Assurance is usually added, as follows:—

And farther, that he, the said party of the first part and his heirs, shall and will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make and execute all such other deed or deeds, or other assurance in law, for the more certain and effectual conveyance of the said piece or parcel of ground and premises and appurtenances, unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or counsel learned in the law, shall advise or require.

Form 264.

DISTRICT OF COLUMBIA: *Statutory Form of Simple Deed.*

Fee Simple Deed. This deed, made this ——— day of ———, in the year ———, by me, ——— of ———, witnesseth, that in consideration of ——— I, the said ———, do grant unto ——— of ——— all that (*describe the property*).

Witness my hand and seal.

——— (SEAL.)

Form 265.

DISTRICT OF COLUMBIA: *Deed by Husband and Wife.*

This deed, made this ——— day of ———, in the year, ———, by us, ——— and ———, his wife, of ———, witnesseth, that in consideration of ——— we, the said ——— and his wife, do grant unto ——— of ——— (*describe the property*).

Witness our hands and seals.

——— (SEAL.)
——— (SEAL.)

Form 266.

DISTRICT OF COLUMBIA: *Trustee's Deed Under a Decree.*

This deed, made this ——— day of ———, in the year ———, by me ———, trustee of ———, witnesseth: Whereas, by a decree of ——— court passed on the ——— day of ———, in the

cause of ——— versus ———, I, the said ———, was appointed trustee to sell the land decreed to be sold, and have sold the same to ———; and the sale has been ratified by said court, and said ——— has fully paid the purchase money due on said sale; now, therefore, in consideration of the premises, I, the said ———, do grant unto ——— of ———, all the right and title of all the parties to the aforesaid cause, in and to all that (*describe property.*)

Witness my hand and seal.

——— (SEAL.)

Form 267.

DISTRICT OF COLUMBIA: *Executor's Deed.*

This deed, made this ——— day of ———, in the year ———, witnesseth, that I, ——— of ———, executor of the last will of ———, late of ———, deceased, unde a power in said will contained, in consideration of ———, have sold and do hereby grant to ——— of ———, all that (*describe the property*).

Witness my hand and seal.

——— (SEAL.)

Form 268.

FLORIDA: *Covenants.*

And the said party of the first part, for his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that the said party of the first part, at the time of the sealing and delivery of these presents, is lawfully seized in fee simple of a good, absolute, and indefeasible estate of inheritance of and in all and singular the above granted, bargained, and described premises, with the appurtenances, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid; and that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unincumbered of and from all former and other

grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature and kind soever.

And the said party of the first part, for himself and his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend. In witness, etc.

Form 269.

FLORIDA: *Declaration of Wife in Release of Dower.*

State of ——, county of ———. Know all men by these presents that I, ———, wife of the above named ———, do by these presents, made and executed by me, separate and apart from my said husband and in the presence of (*name and title of officer*), acknowledge and declare that I did make myself a party to and executed the foregoing deed of conveyance, for the purpose of relinquishing all my estate and interest and all my right of dower in and to the lands in said conveyance described and granted, and that I did the same freely and voluntarily, and without any compulsion, constraint, apprehension, or fear from my said husband.

Form 270.

FLORIDA: *Statutory Form of Warranty Deed.*

This indenture, made this ——— day of ———, A. D. ———, between ———, of the county of ———, in the state of ———, party of the first part, and ———, of the county of ———, in the state of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold to the said party of the second part, his heirs and assigns forever, the following described land, to wit:

And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever.

Form 271.

GEORGIA: *Warranty Deed.*

This indenture, made the ——— day of ———, A. D. 19—, between ——— of ———, of the one part, and ——— of ———, of the other part, witnesseth, that the said ———, for and in consideration of the sum of ——— dollars, in hand paid at and before the sealing and delivery, of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said ———, his heirs and assigns, all that parcel of land, situate, etc.

To have and to hold the said premises, with all and singular the rights, members, and appurtenances thereof, to the same belonging, or in any wise appertaining, to the only proper use, benefit, and behoof of the said ———, his heirs, executors, administrators, and assigns, in fee simple; and the said ———, his heirs, executors, administrators, and assigns, unto the said ———, his heirs, executors, administrators, and assigns, against the said ———, his heirs, executors, administrators, and all and every other person or persons, shall and will warrant and forever defend by virtue of these presents. In witness, etc.

Form 272.

HAWAII TERRITORY: *California Forms May be Used.*

Form 273.

IDAHO: *California Forms May be Used.*

Under the revised statutes of Idaho the word grant in any conveyance passing an estate of inheritance, possessing right or fee simple, imparts the following covenants and none other on the part of the grantor: (1) That the grantor has not, previous to the time of the execution of the deed, conveyed the same estate, or any right, title or interest therein to any person other than the grantee; and (2) that such estate is at the time of the execution of the deed free from incumbrances, done, made, or suffered by the grantor or by any person claiming under him. R. S. 1887, section 2935.

Form 274.

ILLINOIS: *Warranty Deed.*

This indenture, made the ——— day of ———, A. D. 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents does grant, bargain, sell, remise, release, convey, aliene, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that parcel of land, situate, etc.; together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said ——— party of the first part, for himself and his heirs, executors, and administrators, doth covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances, of what kind of nature soever; and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person and persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend. In witness, etc.

Form 275.

ILLINOIS: *Quitclaim Deed.*

This indenture, made this ——— day of ———, 19—, between ——— of ———, in the county of ——— and state of ———, party of the first part, and ——— of ———, in the county of ——— and state of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which said party of the first part has in and to the following described lot, piece, or parcel of land, situated in the county of ——— and state of ———, and known and described as follows, to wit, etc.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever. In witness, etc.

Form 276.

ILLINOIS: *Statutory Form Warranty Deed.*

The grantor, ——— of ———, in the county of ——— and state of ———, for and in consideration of ——— dollars in hand paid, conveys and warrants to ——— of ———, in the county of ——— and state of ———, the following described real estate (*here insert description*), situated in the county of ———, in the state of Illinois. Dated this ——— day of ———, 19—.

Form 277.

ILLINOIS: *Statutory Form Quitclaim Deed.*

The grantor, ——— of ———, in the county of ——— and state of ———, for the consideration of ——— dollars, conveys and quitclaims to ——— of ———, in the county of ——— and

state of ———, all interest in the following described real estate (*here insert description*), situated in the county of ———, in the state of Illinois. Dated this ——— day of ———, 19—.

Form 278.

IOWA: *Warranty Deed.*

Know all men by these presents: That I, ——— of ——— in the state of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 279.

IOWA: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the state of ———, in consideration of ——— dollars to me paid by ——— of ——— the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows: etc.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and

assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 280.

IOWA: *Statutory form Quitclaim Deed.*

For the consideration of ——— dollars I hereby quitclaim to ——— all my interest in the following tract of real estate (*describing it*).

Form 281.

IOWA: *Statutory Form Deed in Fee Simple without Warranty.*

For the consideration of ——— dollars, I hereby convey to ——— the following tract of real estate (*describing it*).

Form 282.

IOWA: *Statutory Form Deed in Fee with Warranty.*

Add to the last the words, And I warrant the title against all persons whomsoever (*or other words of warranty as the party may desire*).

Form 283.

INDIANA: *Statutory Form. A Warranty Deed.*

A. B. conveys and warrants to C. D. (*here describe the premises*), for the sum of (*here insert the consideration*).

Form 284.

INDIANA: *Statutory Form Quitclaim Deed.*

A. B. quitclaims to C. D. (*here describe the premises*), for the sum of (*here insert the consideration*).

Form 285.

KANSAS: *Warranty Deed.*

This indenture, made on the ——— day of ——— A. D. 19—, by and between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars to him paid by the said party of the second part, the receipt of which is hereby acknowledged, doth by these presents grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, all that, etc. To have and to hold the premises aforesaid, with all and singular the rights, privileges, appurtenances, and immunities thereunto belonging or in any wise appertaining, unto the said party of the second part, and unto his heirs and assigns, forever; the said ——— hereby covenanting that he is lawfully seized of an indefeasible estate in fee in the premises hereby conveyed; that he has good right to convey the same; that the said premises are free and clear of any incumbrances done or suffered by him or those under whom he claims, and that he will warrant and defend the title to the said premises unto the said party of the second part, and unto his heirs and assigns, forever, against the lawful claims and demands of all persons whomsoever. In witness, etc.

Form 286.

KANSAS: *Statutory Form of Warranty Deed.*

——— conveys and warrants to ——— (*here describe the premises*), for the sum of (*here insert the consideration*).

Form 287.

KANSAS: *Statutory Form of Quitclaim Deed.*

——— quitclaims to ——— (*here describe the premises*), for the sum of (*here insert the consideration*).

Form 288.

KENTUCKY: *Warranty Deed.*

This deed, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, in consideration of ——— dollars,

the receipt of which is hereby acknowledged, doth hereby sell, grant, and convey to the said party of the second part, his heirs and assigns, all that, etc. To have and to hold the same, with the appurtenances thereon, to the said party of the second part, his heirs and assigns forever, with covenant of general warranty. In testimony whereof witness our signatures this ——— day of ———, 19—.

Form 289.

MAINE: *Warranty Deed.*

Know all men by these presents: That I, ——— of ——— in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 290.

MAINE: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ——— the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the priv-

ileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 291.

MARYLAND: *Warranty Deed.*

This deed, made this ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that in consideration of ——— dollars the said ——— doth grant and convey unto the said, ——— his heirs and assigns, in fee, all that, etc.; together with the improvements thereon, and the rights and appurtenances thereto, belonging or appertaining. To have and to hold the property and premises hereby mentioned to be granted and conveyed, with the rights and appurtenances aforesaid, unto the said ———, his heirs and assigns, to his and their proper use and benefit forever in fee.

And the said ——— covenants that he has not done, or suffered to be done, any act, matter, or thing whatsoever, to incumber the property hereby conveyed; that he will warrant the said property specially to the said ———, his heirs and assigns; and that he will execute such further assurance as may be requisite. Witness the hands and seals of the said grantors.

Form 292.

MARYLAND: *Statutory Deed in Fee Simple.*

This deed, made this ——— day of ———, in the year ———, by me ———, witnesseth, that in consideration of ——— dollars, I, the said ———, do grant unto ——— all that (*here describe the property*). Witness my hand and seal.

Form 293.

MARYLAND: *Statutory where Married Woman is a Party.*

This deed, made this ——— day of ———, in the year ———, by us, ——— and ———, his wife, witnesseth, that in consideration of ———, we, the said ——— and his wife, do grant unto ——— all that, etc. Witness our hands and seals.

Form 294.

MARYLAND: *Statutory Conveyance of Estate for Life.*

This deed, made this ——— day of ———, in the year ———, by me, ———, witnesseth, that in consideration of ———, I, the said ———. do grant unto ——— all that, etc., to hold during his life and no longer. Witness my hand and seal.

Form 295.

MARYLAND: *Statutory Executor's Deed.*

This deed, made this ——— day of ———, in the year ———, witnesseth, that I, ———, executor of the last will of ———, late of ——— county, deceased, under a power in said will contained, in consideration of the sum of ———, have bargained and sold to ——— all that parcel of land (*describe the land as in the report of the executor to the court*).

Witness my hand and seal.

Form 296.

MARYLAND: *Statutory Form. Assignment of Leasehold.*

This deed made this ——— day of ———, in the year ———, between ——— of ——— in the state of Maryland, of the first part, and ——— of ——— of the second part, witnesseth, that in consideration of the sum of ——— the said ——— doth grant and convey unto the said ———, his personal representatives and assigns, all ——— of ground situate in ——— aforesaid, and described as follows, that is to say, together with the buildings thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging or in anywise appertaining.

To have and to hold the said described lot of ground and premises, unto and to the use of the said ———, his personal repre-

sentatives and assigns, for all the residue of the term of years yet to come and unexpired therein, with the benefit of renewal forever, subject to the payment of the annual rent of ———.

And the said ——— hereby covenants that he has not done or suffered to be done any act, matter or thing whatsoever, to incumber the property hereby conveyed; that he will warrant specially the property hereby granted, and that he will execute such further assurances of the same as may be requisite.

Witness the hand and seal of said grantor.

Form 297.

MASSACHUSETTS: *Warranty Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 298.

MASSACHUSETTS: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ———, the release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ———, and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 299.

MICHIGAN: *Warranty Deed.*

This indenture, made this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ——— of the first part, and ——— of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, doth by these presents grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part, and his heirs and assigns forever, all that certain piece or parcel of land situate and being in the ——— of ———, county of ———, and state of Michigan, and described as follows, to wit: Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the said premises, as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said ———, party of the first part, his heirs, executors and administrators, doth covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he was well seized of the above granted premises in fee simple; and that they are free from all incumbrances whatever and that ——— will, and his heirs, executors and administrators shall, warrant and defend the same against all lawful claims whatsoever.

In witness, etc.

Form 300.

MICHIGAN: *Same.*

A. B. conveys and warrants to C. D. (*here describe the premises*), for the sum of (*here insert the consideration*).

Form 301.

MICHIGAN: *Quitclaim Deed.*

A. B. quitclaims to C. D. (*here describe the premises*), for the sum of (*insert consideration*).

Form 302.

MINNESOTA: *Warranty Deed Commonly Used.*

This indenture, made this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ———, party of the first part, and ———, party of the second part, witnesseth, that the said party of the first part, in consideration of the sum of ——— dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all that tract or parcel of land lying and being in the county of ———, and state of Minnesota, described as follows, to wit:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever. And the said ———, party of the first part, for his heirs, executors and administrators, doth covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances; and the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend.

In testimony whereof the said party of the first part hereunto sets his hand and seal the day and year first above written.

Form 303.

MINNESOTA: *Warranty Deed.*

A. B., grantor of ———, for and in consideration of ———, conveys and warrants to C. D., grantee, of ———, the following described real estate in the county of ——— in the state of Minnesota: (*Here describe premises.*)

Form 304.

MINNESOTA: *Quitclaim Deed.*

A. B., of ———, for the consideration of ———, conveys and quitclaims to C. D., the grantee, of ———, all interest in the following described real estate in the county of ———, in the state of Minnesota: (*Here describe premises.*)

Form 305.

MISSISSIPPI: *Warranty Deed.*

State of Mississippi, ———, ss. This deed of conveyance, made this ——— day of ———, 19—, between ——— of ———, and ——— of ———, his wife, parties of the first part, and ——— of ———, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of ——— dollars, have granted, bargained, sold, and conveyed, and do grant, bargain, sell, and convey, to the said party of the second part a certain, etc. To have and to hold the above described premises, with the appurtenances, to the said party of the second part and his heirs. And the said parties of the first part covenant with the party of the second part that they will warrant and forever defend the title of the same to the party of the second part, and his heirs and alienees under him, free from and against the right, title, or claim of him and his heirs, and from all and every person or persons whomsoever, both at law and equity.

In testimony of which the parties of the first part have hereunto put their names and seals this day and year first above written.

Form 306.

MISSISSIPPI: *Statutory Form of Warranty Deed.*

In consideration of (*here state it*), I convey and warrant to ——— the land described as (*describe it*). Witness my signature the ——— day of ———, 19—.

Form 307.

MISSISSIPPI: *Statutory Form. Deed of Sheriff.*

By virtue of an execution issued by the clerk of the circuit court of ——— county, on the ——— day of ———, A. D. ———, returnable before said court on the ——— Monday of ———, A. D. ———, to enforce a judgment of said court rendered on the ——— day of ———, A. D. ———, in favor of ——— against ———, for ——— dollars and costs, I, as sheriff of ——— county, have this day, according to law, sold the following lands, to wit (*here describe the land*); when ——— became the best bidder therefor at the sum of dollars; and he having paid said sum of money, I now convey said land to him. Witness my hand the ——— day of ———, A. D. ———. ———, Sheriff.

Form 308.

MISSISSIPPI: *Statutory Form. Deed of Administrator, Executor, Guardian, Master, or Commissioner.*

By virtue of the authority conferred on me, administrator of the estate of ———, deceased, by the decree of the chancery court of ——— county, rendered on the ——— day of ———, confirming a sale made on the ——— day of ———, in pursuance of a decree of said court rendered on the ——— day of ———, I, as administrator of said estate, in consideration of ——— dollars, convey to ———, the purchaser thereof, the following land, to wit (*here describe the land*). Witness my signature, the ——— day of ———, A. D. ———.

Form 309.

MISSOURI: *Statutory Form of Deed with Covenants of General Warranty.*

Know all men by these presents that I, ———, of the county of ———, in the state of Missouri, have this day, for and in consideration of the sum of ——— dollars to me, the said ———, in hand paid by ———, of the county of ———, in the state of ———, granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said ———, the following described tracts or parcels of land situate in the county of ———, in the state of Missouri: that is to say (*here describe the land*). To have and to hold the premises hereby conveyed, with all the rights, privileges, and appurtenances thereto belonging or in any

wise appertaining, unto the said ———, his heirs and assigns, forever, I, the said ———, hereby covenanting to and with the said ———, his heirs and assigns, for himself, his heirs, executors, and administrators, to warrant and defend the title to the premises hereby conveyed against the claim of every person whatsoever. In witness whereof I have hereto subscribed my name and affixed my seal, this ——— day of ———, 19—.

Form 310.

MONTANA: *Statutory Form of Deed.*

I, ———, in consideration of ——— dollars now paid, grant to ——— all the real property situated in (*insert name of county*) county, state of Montana, bounded (*or described*) as follows: (*here insert description, or, if the land sought to be conveyed has a descriptive name, it may be described by the name, as, for instance, "The Norris Ranch."*)

Witness my hand this (*insert day*) day of (*insert month*), 19—.

Form 311.

MONTANA: *Warranty Deed Generally Used.*

This indenture, made the ——— day of ———, A. D. one thousand nine hundred and ———, between ——— of ———, party of the first part, and ——— of ———, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars ($———), lawful money of the United States of America, to ——— in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, doth by these presents grant, bargain, sell, convey, warrant and confirm unto the said party of the second part, and to his heirs and assigns forever, the hereinafter described real estate, situated in the city or town of ———, county of ———, and state of Montana, to wit: Together with all and singular the hereinbefore described premises, together with all tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion or reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, right of dower and right of homestead, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances therto belonging. To have and to hold all and singular the above men-

tioned and described premises unto the said party of the second part, and to his heirs and assigns forever.

And the said party of the first part, and his heirs, doth hereby covenant that he will forever warrant and defend all right, title and interest in and to the said premises and the quiet and peaceable possession thereof, unto the said party of the second part, his heirs and assigns, against the acts and deeds of the said party of the first part, and all and every person and persons whomsoever lawfully claiming or to claim the same.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first hereinbefore written.

Form 312.

NEBRASKA: *Warranty Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 313.

NEBRASKA: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ——— the receipt whereof is hereby acknowledged,

do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 314.

Nevada.

California forms may be used.

Form 315.

New Hampshire: *Warranty Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars, the receipt whereof is acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same

to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 316.

New Hampshire: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ——— the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 317.

New Jersey: *Statutory Form of Deed.*

This deed, made the ——— day of ———, in the year ———, between (*here insert names and residences of parties*), witnesseth, that in consideration of (*here state the consideration*) the said ——— doth (*or* do) grant and convey unto the said ———, all, etc. (*here describe the property and insert covenants or any other provisions*).

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered ———, in the presence of ———.

Form 318.

NEW JERSEY: *Warranty Deed Generally Used.*

This indenture, made the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ——— of ———, of the first part, and ——— of ———, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, his heirs and assigns, all, together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances:

To have and to hold the said premises, with all and singular the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

And the said ———, his heirs, executors and administrators, doth by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that ———, the said ———, his heirs, all and singular the hereditaments and premises, hereinabove described and granted, or mentioned and intended to be so, with the appurtenances, unto the said party of the second part, his heirs and assigns, against ———, the said ———, his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend.

In witness whereof, the said party of the first part to these presents has hereunto set his hand and seal dated the day and year first above written.

Form 319.

NEW MEXICO: *Warranty Deed.*

This indenture, made the ——— day of ——— A. D. 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom has granted, bargained, sold, remised, released, conveyed, aliened, and confirmed and by these presents does grant, bargain, sell, remise, release, convey, aliene, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that parcel of land, situate, etc.; together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said ——— party of the first part, for himself and his heirs, executors, and administrators, doth covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances, of what kind or nature soever; and the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person and persons lawfuly claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness, etc.

Form 320.

NEW MEXICO: *Quitclaim Deed.*

This indenture, made this ——— day of ——— 19—, between ——— of ———, in the County of ——— and state of ——— party of the first part, and ——— of ———, in the county of ——— and state of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which said party of the first part has in and to the following described lot, piece, or parcel of land, situated in the county of ——— and state of ———, known and described as follows, to wit, etc.:

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

In witness, etc.

Form 321.

NEW YORK: *Statutory Form of Deed Containing Full Covenants.*

This indenture, made the ——— day of ———, in the year nineteen hundred and ———, between ———, of (*insert residence*), of the first part, and ———, of (*insert residence*), of the second part, witnesseth: That the said party of the first part, in consideration of ——— dollars, lawful money of the United States, paid by the party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever (*description*), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part doth covenant with the said party of the second part as follows:

First. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same.

Second. That the party of the second part shall quietly enjoy the said premises.

Third. That the said premises are free from incumbrances.

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises.

Fifth. That the party of the first part will forever warrant the title to said premises.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

In the presence of ———.

Form 322.

NEW YORK: *Executor's Deed.*

This indenture, made the ——— day of ———, nineteen hundred and ———, between ———, as executor of the last will and testament of ———, late of ———, deceased, of the first part, and ——— of ———, of the second part, witnesseth: That the said party of the first part, by virtue of the power and authority to him given in and by the said last will and testament, and in consideration of ——— dollars, lawful money of the United States, paid by the said party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever (*description*), together with the appurtenances, and also all the estate which the said testator had at the time of his decease in said premises and also the estate therein which the said party of the first part has, or has power to dispose of, whether individually or by virtue of said will or otherwise.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part covenants with the said party of the second part that the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and the year above first written.

In the presence of ———.

Form 323.

NORTH CAROLINA: *Warranty Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain,

sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the rights, easements and appurtances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of, or to, both dower and homestead in the granted premises.

In witness whereof, etc.

Form 324.

North Carolina: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ——— the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of, or to, both dower and homestead in the granted premises.

In witness whereof, etc.

Form 325.

NORTH DAKOTA: *Statutory Form of Deed.*

This grant, made the ——— day of ———, in the year ———, between A. B., of ———, of the first part, and C. D., of ———, of the second part, witnesseth, that the party of the first part hereby grants to the party of the second part, in consideration of ——— dollars now received, all the real property situated in ———, and bounded (*or* described) as follows:

Witness the hand of the party of the first part. A. B.

Form 326.

Same. Warranty Deed.

This indenture, made this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ———, party of the first part, and ———, party of the second part, witnesseth, that the said party of the first part, in consideration of the sum of ——— dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns, forever, all that tract or parcel of land lying and being in the county of ——— and state of North Dakota, to wit:

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, his heirs and assigns, forever. And the said ———, party of the first part, for his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will warrant and defend.

In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

Form 327.

OHIO: *Warranty Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows, etc.:

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 328.

OHIO: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ——— the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows:— etc.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said

grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 329.

OKLAHOMA: *Statutory form of deed.*

Know all men by these presents, that ——— of ———, party of the first part, in consideration of the sum of ——— dollars in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, and convey unto ——— of ———, party of the second part, the following described real property and premises, situate in ——— county, state of Oklahoma, to wit, ———, together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same. To have and to hold said described premises unto the said party of the second part, ——— heirs and assigns forever, free, clear, and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature.

Signed and delivered this ——— day of ———, 19—.

Form 330.

OREGON: *Warranty Deed.*

Know all men by these presents: That I, ——— of ——— in the state of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows: etc.

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to

the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 331.

OREGON: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ———, the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows: etc.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ———, and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 332.

PENNSYLVANIA: *Warranty deed.*

This indenture, made the ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained,

sold, aliened, enfeoffed, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, aliene, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns, all that parcel, etc.; together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and of every part and parcel thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, both in law and equity, of the said party of the first part, of, in, and to the said premises, with the appurtenances:

To have and to hold the said premises, with all and singular the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, his heirs, executors, and administrators, does by these presents covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, forever, that he, the said party of the first part, and his heirs, all and singular the hereditaments and premises herein above described and granted, or mentioned and intended to be so, with the appurtenances, unto the said party of the second part, his heirs and assigns, against him, the said party of the first part, and his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, shall and will warrant and forever defend. In witness whereof, etc.

Form 333.

Same: Quitclaim Deed.

This indenture, made the ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars lawful money of the United States of America, to him well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns, forever, all that parcel, etc.; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, rents, issues,

and profits thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever. In witness whereof, etc.

Form 334.

Same. Statutory Form.

Under a statute which was approved April 1, 1909, the form of deed for conveying or releasing lands may be as follows:

This deed, made the ——— day of ———, in the year nineteen hundred and ———, between ——— (*here insert name or names and residence of grantor or grantors*) and ——— (*here insert name or names and residence of grantee or grantees*), witnesseth, that in consideration of ——— dollars in hand paid, the receipt whereof is hereby acknowledged, the said grantor does hereby grant and convey (*or* release and quitclaim) to the said grantee, all ——— (*here give location and description of property conveyed or released, with recitals if desired*) ——— (*if reservations, exceptions, or special conditions, insert same here*) ——— (*if covenants of general or special warranty, insert same here*).

In witness whereof, said grantor has hereunto set his hand and seal, the day and year first above written.

Form 335.

Same. Form of Sheriff's Deed.

Know all men by these presents, that I, ———, sheriff of the county of ——— in the state of Pennsylvania, for and in consideration of the sum of ——— dollars to me in hand paid, do hereby grant and convey to ——— of ———, the same having been sold by me to said grantee on the ——— day of ———, Anno Domini one thousand nine hundred and ———, after due advertisement, according to law, under and by virtue of a writ ———, issued on the ——— day of ———, Anno Domini ———, out of the ——— court, as of —— — term, one thousand nine hundred and ———, number ———, at the suit of ——— against ———. In witness

whereof, I have hereunto affixed my signature this ——— day of ———, Anno Domini one thousand nine hundred and ———.

Commonwealth of Pennsylvania, *ss*:

Before the undersigned, ——— of the ———, personally appeared ———, sheriff of the county aforesaid, and in due form of law declared that the facts set forth in the foregoing deed are true, and that he acknowledged the same in order that said deed might be recorded.

Witness my hand and seal of said court, this ——— day of ———, Anno Domini one thousand nine hundred and ———.

Form 336.

RHODE ISLAND: *Warranty Deed.*

Know all men by these presents: That I, ——— of ——— in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows: etc.

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 337.

Same: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the state of ———, in consideration of ——— dollars to me paid by ——— of ———, the receipt whereof is hereby acknowledged. do hereby remise, release and forever quitclaim, unto the said

——— all that parcel of land situate in said ——— bounded as follows:— etc.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ———, and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of ———, wife of the said ——— do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 338.

SOUTH CAROLINA: *Statutory form of warranty deed.*

The state of South Carolina: Know all men by these presents, that I, ——— of ———, in the state aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said ———, all that (*here describe premises*); together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining: To have and to hold all and singular the premises before mentioned unto the said ———, his heirs and assigns, forever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and defend all and singular the said premises unto the said ———, his heirs and assigns, against myself and my heirs, and against every person whomsoever lawfully claiming or to claim the same, or any part thereof. Witness my hand and seal this ——— day of ———, in the year of our Lord ———, and in the ——— year of the independence of the United States of America.

Form 339.

SOUTH DAKOTA: *Statutory form of deed.*[1]

This grant, made the ——— day of ———, in the year ———, between ——— of ———, of the first part, and ——— of ———, of the second part, witnesseth, that the party of the first part

hereby grants to the party of the second part, in consideration of ——— dollars now received, all the real property situated in ———, and bounded (*or described*) as follows:—

Witness the hand of the party of the first part.

Form 340.

Same. Warranty Deed.

Know all men by these presents, that ——— of ———, county and state of South Dakota, part of the first part, for and in consideration of the sum of ——— dollars to him in hand paid by ———, party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns, forever, the following described real estate, lying and being in the county of ——— and state of South Dakota, to wit:—

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, his heirs and assigns, forever. And the said ———, party of the first part, for his heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid, that the same are free from all incumbrances; and the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will forever warrant and defend.

And the said ——— hereby relinquishes his right of dower in and to the above described premises.

In testimony whereof, the said party of the first part has hereunto set his hand and seal this ——— day of ———, 19—.

Form 341.

Same. Quitclaim deed.

Know all men by these presents, that ——— of the county of ———, in the state of ———, party of the first part, in consideration of the sum of ——— dollars in hand paid by ——— of the county of ——— and state of ———, party of the second part, the receipt whereof is hereby acknowledged, does hereby remise, release, and quitclaim unto the said party of the

second part, his heirs and assigns, forever, all his estate, right, title, interest, claim, property, and demand of, in, and to the following real property, situated in the county of ———, of the state of South Dakota, and described as follows:—

To have and to hold the same, together with all the hereditaments and appurtenances thereunto in anywise appertaining.

Witness his hand and seal this ——— day of ———, A. D. 19—.

Form 342.

TENNESSEE: *Statutory form. Deed in fee, with warranty.*

I hereby convey to ——— the following tract of land (*describing it*), and I warrant the title against all persons whomsoever.

Form 343.

Statutory form. Covenants of seizin, possession, and special warranty.

I covenant that I am seized and possessed of the said land, and have a right to convey it, and I warrant the title against all persons claiming under me.

Form 344.

Quitclaim Deed.

I hereby quitclaim to ——— all my interest in the following land (*describing it*).

Form 345.

Usual Form of Covenants.

And the said ———, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said ———, his heirs or assigns, that he is lawfully seized in fee of the aforegranted premises; that the same are free from all incumbrances; and that he has a good right to sell and convey the same to the said ———, as aforesaid; and that the before granted land and premises he will warrant and forever defend against the right, title, interest, or claim of all and every person whomsoever.

Form 346.

TEXAS: *Statutory form of warranty deed.*

State of Texas, county of ———. Know all men by these presents that I, ——— of ———, in the state aforesaid, for and in consideration of ——— dollars to me in hand paid by ———, have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said ———, in the state of ———, all that certain (*describe the premises*). To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said ———, his heirs or assigns, forever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said ———, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof. Witness my hand this ——— day of ———, A. D. 19—.

Signed and delivered in the presence of ———.

Form 347.

UTAH: *Statutory Form of Warranty Deed.*

A. B., grantor (*here insert name or names and place of residence*), hereby conveys and warrants to C. D., grantee (*here insert name or names and place of residence*), for the sum of ——— dollars, the following described tract— of land in ——— county, Utah (*here describe the premises*).

Witness the hand of said grantor, this ——— day of ———, A. D. ———.

Form 348.

Same Statutory Form of Quitclaim Deed.

A. B. grantor (*insert here name or names and place of residence*), hereby quitclaims to C. D., grantee (*here insert name or names and place of residence*), for the sum of ——— dollars, the following described tract— of land in ——— county, Utah (*here describe the premises*).

Witness the hand of said grantor this ——— day of ——— A. D. ———.

Form 349.

VERMONT: *Warranty Deed.*

Know all men by these presents: That I, ——— of ——— in the State of ———, in consideration of ——— dollars, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said ——— all that certain parcel of land situate in said ——— and bounded as follows: etc.

To have and to hold the granted premises, with all the rights, easements and appurtenances thereto belonging, to the said ———, his heirs and assigns, to his and their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, ——— of ———, wife of the said ———, do hereby release unto the grantee and his heirs and assigns all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form 350.

VERMONT: *Quitclaim Deed.*

Know all men by these presents: That I, ——— of ———, in the State of ———, in consideration of ——— dollars to me paid by ——— of ———, the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim, unto the said ——— all that parcel of land situate in said ——— and bounded as follows: etc.

To have and to hold the granted premises, with all the privileges and appurtenances therto belonging, to the said ———, and his heirs and assigns, to their own use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said

grantee and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under me.

And for the consideration aforesaid, I, ——— of———, wife of the said ———, do hereby release unto the said grantee and his heirs and assigns, all rights of or to both dower and homestead in the granted premises.

In witness whereof, etc.

Form. 351.

VIRGINIA AND WEST VIRGINIA: *Warranty Deed.*

This deed, made this ——— day of ———, 19—, between ——— of ———, of the first part, and ——— of ———, of the second part, witnesseth, that in consideration of the sum of ——— dollars, the said ——— doth grant unto the said ———, with general warranty, all that, etc. ———. The said ——— covenants that he hath the right to convey the said land to the grantee; that he has done no act to incumber the said land; that the grantee shall have quiet possession of the said land, free from all incumbrances; and that he, the said party of the first part, will execute such further assurance of the said land as may be requisite. Witness the following signature and seal.

Form 351a.

Same. Statutory Forms.

This deed, made the ——— day of ———, in the year ———, between (*here insert names of parties*), witnesseth, that in consideration of (*here state the consideration*), the said ——— doth (*or* do) grant unto the said ——— all, etc. (*here describe the property and insert covenants or any other provisions*). Witness the following signature and seal (*or* signatures and seals).

The deed is a release or quitclaim, when the words used are:

"The said grantor (*or* the said ———) releases to the said grantee (*or* the said ———) all his claims upon the said lands."

Form 352.

WASHINGTON: *Statutory Form of Warranty Deed.*

The grantor, ———, for and in consideration of ——— in hand paid, conveys and warrants to ——— the following described real estate ———, situated in the county of ———, state of Washington. Dated this ——— day of ———, 19—. (*Seal.*)

Form 352.

Statutory form of Same. Form of Bargain and Sale Deed.

The grantor, ———, for and in consideration of ——— in hand paid, bargains, sells, and conveys to ——— the following described real estate ———, situated in the county of ———, state of Washington. Dated this ——— day of ———, 19—. (*Seal.*)

Form 353.

Same. Statutory Form of Quitclaim Deed.

The grantor, ———, for the consideration ———, conveys and quitclaims to ——— all interest in the following described real estate ———, situated in the county of ———, state of Washington. Dated this ——— day of ———, 19—. (*Seal*).

Form 354.

Same. Warranty Deed in Common Use.

This indenture witnesseth, that ———, party of the first part, for and in consideration of the sum of ——— dollars in ——— of the United States of America, to ——— in hand paid by ———, party of the second part, has granted, bargained, sold, and by these presents doth grant, bargain, sell, and convey unto the said party of the second part and to his heirs and assigns, the following described premises, situate, lying and being in the county of ———, state of Washington, to wit:—

To have and to hold the said premises, with their appurtenances, unto the said party of the second part, his heirs and assigns, forever, and ———, the said party of the first part, doth hereby covenant to and with the said party of the second part, his heirs and assigns, that he is the owner in fee simple of said premises; that they are free from all incumbrances; and that he will warrant and defend the same from all awful claims whatsoever.

Witness his hand and seal, etc.

Form 355.

Same. Warranty Deed of a Corporation.

This indenture, made this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ———, a corporation duly organized and existing under and by virtue of

the laws of the state of ———, and duly authorized to do business in the state of Washington, party of the first part, and ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, ———, of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns, the following described tract, lot or parcel of land, situated, lying and being in the county of ———, state of Washington, and particularly bounded and described as follows, to wit: together with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises, with the tenements, hereditaments, and appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, and its successors, does by these presents covenant, grant, and agree to and with said party of the second part, heis heirs and assigns, that it, the said party of the first part, and its successors, all and singular the premises hereinabove conveyed, described, and granted or mentioned, with the tenements, hereditaments, and appurtenances, unto the said party of the second part, his heirs and assigns, and against all and every person or persons whosoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend.

In witness whereof, the said party of the first part has caused these presents to be subscribed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, the day and year first above written.

———,
By ———, Its President.

Attest: ———,
By ———, Its Secretary.

Form 355.

Statutory Form. Warranty Deed.

———, grantor, of ——— county, Wisconsin, hereby conveys and warrants to ———, grantee, of ——— county, Wisconsin, for the sum of ——— dollars, the following tract of land in ——— county (*here describe the premises*). Witness the hand and seal of said grantor this ——— day of ———, 19—.

Form 356.

Same. Statutory Form Quitclaim Deed.

———, grantor, of ——— county, Wisconsin, hereby quitclaims to ———, grantee, of ——— county, Wisconsin, for the sum of ——— dollars, the following tract of land in ——— county (*here describe the premises*). Witness the hand and seal of said grantor this ——— day of ———, 19—.

Form 357.

WISCONSIN.

Warranty Deed. Generally Used.

This indenture, made the ——— day of ——— A. D. 19— between ——— of ———, party of the first, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars, in hand paid by the said party of the second part, the receipt whereof is hereby asknowledged, and the said party of the second part forever released and discharged therefrom has granted, bargained, sold, remised, released, conveyed, aliened, and confirmed and by these presents does grant, bargain, sell, remise, release, convey, aliene, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that parcel of land, situate, etc.; together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

And the said ——— party of the first part, for himself and his heirs, executors, and administrators, doth covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and incumbrances, of what kind or nature soever; and the above

and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person and persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend. In witness, etc.

Form 358.

Quitclaim Deed. Generally Used.

This indenture, made this ——— day of ——— 19—, between ——— of ———, in the County of ——— and state of ——— party of the first part, and ——— of ———, in the county of ——— and state of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has remised, released, sold, conveyed, and quitclaimed, and by these presents doth remise, release, sell, convey, and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which said party of the first part has in and to the following described lot, piece, or parcel of land, situated in the county of ——— and state of ———, known and described as follows, to wit, etc.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

In witness, etc.

Form 359.

WYOMING: *Warranty Deed.*

A. B., grantor (*here insert name or names and place of residence*), for and in consideration of (*here insert consideration*) in hand paid, conveys and warrants to C. D., grantee (*here insert the grantee's name or names and place of residence*), the following described real estate (*here insert description*), situate in the county

of ———, state of Wyoming. (*And when the right of homestead is involved, add the following*:) Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of said state.

Dated this ——— day of ———, A. D. 19—. In presence of ———.

(*Signed*) A. B.

CHAPTER IV.

DECLARATIONS OF TRUST, TRUST DEEDS TO SECURE MARRIAGE SETTLEMENTS AND TO SECURE INDEBTEDNESS, MORTGAGES, ASSIGNMENTS AND RELEASES OF MORTGAGES, AND SPECIAL CLAUSES IN TRUST DEEDS AND MORTGAGES.

F. 360. Declaration of trust. Purchaser acting as agent.

360a. Declaration of trust where part of purchase money is paid by another.

361. Declaration of trust as to trust funds included in a settlement.

362. Declaration of trust indorsed on deed made to grantee as nominal purchaser.

363. Conveyance in trust to the use of another.

364. Conveyance in trust providing for support of parents, giving them power of appointment and reserving rents for payment of incumbrance.

365. Trust to hold property of husband conveyed on marriage settlement.

366. Trust to hold real and personal property conveyed by intended husband on marriage settlement.

367. Ante nuptial trust providing for settlement of wife's after acquired property.

368. Trust for husband and wife providing for sale of real estate.

F. 369. Marriage settlement. Appointment of new trustee.

370. Intended wife's release of all interest in husband's property on receipt of specified sum.

371. Trust to hold land on post nuptial settlement for such uses as wife may appoint.

372. Deed to a trust company in trust for the benefit of the grantor and others.

373. Wife's deed of confirmation on attaining twenty-one years of a settlement made by her while an infant.

374. Appointment of a new trustee in place of a deceased trustee under a marriage settlement to be indorsed on the instrument.

375. Deed by wife confirming marriage settlement made while an infant.

376. Deed of trust to secure loan.

377. Deed of trust to trustees of Savings bank.

378. Reconveyance.

F. 379. Trust deed to secure bonded indebtedness, land, mining claims, etc.
380. Trust deed by street railroad company to secure bonded indebtedness, land franchise, etc.
381. Mortgage, attorneys' fees, etc.
382. Mortgage, installment note, power of sale.
383. Satisfaction of mortgage.
384. Same. Massachusetts form.
385. Same. New York form.
386. Utah. Certificate of discharge.
387. Provision for the payment on demand of moneys due a bank on current account.
388. Reduction of interest to be made for punctual payment of same.
389. Same. Another form.
390. Agreement that whole debt shall become due upon default in payment of any installment or interest.
391. Same. Short form.
392. Provision in trust deed for selling in case of default.
393. Provision for payment of attorneys' fees in foreclosure.
394. Mortgagor entitled to possession for default in payment of principal or interest.
395. Power of sale by whom to be exercised.
396. Agreement by purchaser to pay mortgage and agreement by mortgagee to extend same.
F. 397. Payment of principal by installments.
398. Agreement by mortgagor to keep in repair.
399. Agreement to repay expenses for prevention of waste and for protection of title.
400. Payment of present debt and future advances.
401. Power reserved to the mortgagor to grant leases.
402. Payment of debt and interest.
403. Provision for repayment of insurance.
404. Provision for repayment of taxes and incumbrances.
405. Agreement to keep down interest on prior mortgage.
406. Agreement by mortgagor to insure.
407. Same. Another form.
408. Agreement to increase rate of interest on mortgage.
409. Declaration that money secured belongs to mortgagees on joint account.
410. Partial or complete payment before maturity of mortgage.
411. Provision for payment of balance by a firm to bankers on account.
412. Declaration that borrower has notice that trustees are stockholders and officers of bank.
413. Assignment of mortgage. New York form.
414. Same. California form.
415. Same. New Jersey form.
416. Same. Pennsylvania form.

F. 417. Same. Illinois form.
418. Michigan form.
419. Same. Maryland statutory form.
420. Massachusetts form, assignment of mortgage.
421. Same. Assignment by receivers of a Savings bank.
422. Wisconsin, statutory form of assignment.
423. Assignment of mortgage as collateral security.
424. Assignment of mortgage by indorsement.
425. Extension of mortgage, form used in New York.
426. Extension of mortgage held by a corporation.
427. Extension of mortgage where principal debt has become due for default in payment of interest.
428. Agreement by mortgagee to postpone sale under mortgage.
F. 429. Massachusetts form for extension of time of payment of mortgage.
430. Another form for extension of time.
431. Discharge by a person to whom by mistake mortgage title had been conveyed.
432. Release of possession by mortgagee without discharge.
433. Virginia form release in satisfaction of a deed of trust.
434. Reconveyance and discharge by indorsement on mortgage.
435. Partial release of mortgage.
436. Same. Another form.
437. Same. Michigan form.
438. Same. Pennsylvania form.

Form 360.

Declaration of Trust. Purchaser Acting as Agent.

Whereas, the undersigned, A. B. has purchased from the government of the Philippine islands that certain estate commonly designated as the San Jose friar estate, situated in the township of Bulalacao, province of Mindoro, P. I., and comprising an area of 24,484 hectares, 81 acres and 50 centares; and

Whereas the said A. B., in purchasing the said etsate, was acting as the agent for C. D. and E. F., who have furnished him the entire amount paid by him for said property:

Now, therefore, in consideration of the premises, the said A. B. hereby declares that he holds the said property in trust for the joint benefit of C. D. and E. F. and has no interest in the same other than the bare legal title; and he hereby covenants and agrees, on behalf of himself, his heirs, executors, administrators and assigns to convey the said property to such persons, firms or corporations as the said persons shall, from time to time, direct, free,

and discharged from any claim or liability to him by reason of any act whatsoever.

In witness whereof the said A. B. has executed this instrument, at Manila, P. I., this ——— day of ——— 1911.

Form 360a.

Declaration of Trust Where Part of Purchase Money is Paid by Another.

This indenture made the ——— day of ———, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part: Whereas by a certain deed dated the ——— day of ———, and recorded in ——— county deeds, book ———, page ———, ——— of ——— conveyed to the said party of the first part a certain piece or parcel of land with the buildings thereon, situate, etc., and whereas, the whole consideration paid by the said party of the first part for the purchase of the said land and premises was ——— dollars, of which consideration one-half part was the money of the said party of the first part, and one-half part was money of the said party of the second part, and said purchase was made by said party of the first part as to one equal undivided half part of said premises as a trustee for and on behalf of the said party of the second part, as the said party of the first part hereby does admit and declare: Now, therefore, in consideration of the premises it is hereby agreed and declared by and between the said parties hereto, that the said party of the first part, his heirs and assigns, does and shall stand seized of one undivided half part of the land and premises with the appurtenances thereof, conveyed by the deed hereinbefore recited, in trust for the said party of the second part, his heirs and assigns forever, and will convey, lease, make such other disposition of the same as he or they shall direct. In witness, etc.

Form 361.

Declaration of Trust as to Trust Funds Included in a Statement.

This indenture made this ——— day of ———, 19—, between A. B. of ———, the party of the first part, and C. D. and E. F., trustees, parties of the second part, supplemental to an indenture dated the ——— day of ———, 19—, made between said A. B., party of the first part and his wife, of the one part; ——— of

——— of the second part; ——— of ——— the third part; and ——— of ——— of the fourth part. Whereas by an indenture bearing even date with these presents, ——— of ———, in consideration of the sum of ——— dollars paid by the said trustees out of money expresed to belong to them on joint account, the said mortgagor conveyed certain land situate at ———, in the county of ———, therein particularly described, to said trustees, to secure payment to them of the sum of ——— dollars, with interest thereon in the meantime at the rate of ——— per cent. per annum: And whereas the said sum of ——— dollars in the said indenture expressed to have been advanced by the said trustees was actually advanced and contributed by the several persons, parties hereto of the second, third, and fourth parts, and in the following proportions or sums: the sum of ——— dollars by the said party of the second part; the sum of ——— dollars by the said party of the third part; and the sum of ——— dollars by the said party of the fourth part: And whereas the said trustees have, at the instance and request of the several persons by whom the said sum of ——— dollars was loaned as aforesaid, agreed to make and execute the declaration of trust hereinafter set out. Now, in pursuance of the said agreemen and in consideration of the premises, the said trustees hereby declare that they and the survivor of them, and the executors and administrators of such survivor, and their or his assigns, shall from this time forward stand possessed of and interested in the said principal sum of ——— dollars secured by the hereinbefore recited indenture of mortgage, and the interest thereon, upon the following trusts: Upon trust out of the moneys which shall be received from time to time under the said mortgage in the first place to pay all the costs, charges, and expenses of and incident to the demanding, recovering, and enforcing payment of the said moneys, and of the execution of the trusts of this indenture: and subject thereto in trust proportionately and *pari passu* for the several persons by whom the said sum of ——— dollars was contributed and advanced, or their respective executors, administrtators, or assigns, according and in proportion to the several sums so contributed and advanced by them respectively as aforesaid: Provided always, and it is hereby further declared, that the power of sale and other powers vested by statute in mortgagees, except powers of leasing and agreeing to lease or let, may be executed and put in force upon the request in writing of any of the several persons by whom the said principal sum of ——— dollars was so contributed and advanced as aforesaid, or any other person or persons for the time being entitled to the whole or a part or share of any of the several sums so contributed and advanced as aforesaid. In witness, etc.

Form 362.

Declaration of Trust Indorsed on a Deed Made to the Grantee Who is Merely a Nominal Purchaser.

Whereas the purchase money for the within described land and premises was advanced and provided and paid by C. D. of ——— and he is the actual purchaser and the conveyance was made to me A. B. of ——— for convenience as a trustee for the purchaser:

Now, know all men by these presents, that I, the said A. B. of ———, do hereby declare that I stand seized of said land and premises within described in trust for the said C. D., his heirs and assigns, and hereby stipulate and agree to convey the same at his request and at his cost to him or to such person or persons at such time or times and in such manner as the said C. D. shall by an instrument in writing direct or appoint.

In witness, etc.

Form 363.

Conveyance in Trust to the Use of Another.

This indenture, made the ——— day of ——— in the year one thousand nine hundred and ——— between A. B. of ———, in the county of ———, and state of ——— (and C. B. his wife), of the first part G. F., of ———, as trustee for X. Y., of the second part, witnesseth: That the said party (*or* parties) of the first part, for and in consideration of the sum of ——— dollars to him (*or,* them) paid by the said party of the second part, the receipt whereof is hereby acknowledged, has (*or,* have) granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and, by these presents, does (*or* do) grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to his heirs and assigns forever, all that lot, piece or parcel of land, situate, lying and being in the county of ——— state of ——— described as follows: (*insert description*).

To have and to hold, all and singular, the above-granted premises together with the appurtenances and every part thereof, unto the said party of the second part, his successors and assigns, forever, in fee, upon the trusts, nevertheless, and to and for the uses, interests and purposes hereinafter limited, described and declared; that is to say, upon trust to receive the issues, rents and profits of the said premises, and apply the same to the use of X. Y. during

the term of his natural life, and after the death of the said X .Y. to convey the same by deed to J. K. in fee.

In witness whereof, etc.

Signed, sealed and delivered
in the presence of ———

Form 364.

Conveyance in Trust, Providing for Support of Parents, Giving Them Power of Appointment and Reserving Rents for Payment of Incumbrances.

This indenture, tripartite, made this ——— day of ——— in the year one thousand nine hundred and ——— between A. B., of ———, party of the first part, and E. F. of ——— party of the second part, and G. B., of ——— wife of M. B., of ———, party of the third part:

Whereas, the undersigned is desirous to make a provision and settlement for the benefit of his father, mother and sisters, by a conveyance in trust of the property hereinafter mentioned, subject, however, to the reservations herein provided and to the trusts and powers herein contained:

Now, this indenture witnesseth: That the said party of the first part, for and in consideration of the sum of ——— dollars to him paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released conveyed and confirmed, and, by these presents does grant bargain, sell, remise, release, convey and confirm unto the said party of the second part and to his successors and assigns forever, all (*insert description of the premises*). Together with, all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever of the said party of the first part, both in law and in equity, of, in and to the above granted premises, with the hereditaments and appurtenances: To have and to hold, all and singular, the above granted premises, together with the appurtenances and every part, unto the said party of the second part, his heirs and assigns forever; (*if there be any incumbrance outstanding add* subject to, *specifying it*).

It is, however, understood as part of this indenture as limiting and controlling the grant, hereby made to the party hereto of the second part, that the party hereto of the first part hereby retains and reserves the possession, use, occupation, rents, issues and profits of the premises hereby conveyed for the purpose of paying and

until the mortgage liens now existing on the said premises shall be paid off or discharged, such retention and reservation of the possession, use, occupation, rents, issues and profits, not, however, to extend beyond the ——— day of ——— one thousand nine hundred and ———, but to terminate sooner if the aforesaid mortgage liens shall be sooner paid off and discharged, or if both M. B. and G. B., the father and mother of the party hereto of the first part, shall sooner depart this life.

In trust, nevertheless, subject to the reservation aforesaid, that the said party of the second part, his heirs, successors and assigns, shall manage and control said property hereby conveyed and shall apply the net income and profits, after deducting for repairs, taxes, assessments and insurance which shall, from time to time, be realized from the premises hereby conveyed to the sole and separate use of the said G. B. during her natural life, free and discharged from any rights or claims of or against her husband, the separate receipt or settlement of the said G. B. therefor to be a full and complete discharge of the said party of the second part.

Secondly, in trust from the death of the said G. B. to apply the said net income and profits, as they shall, from time to time, arise, and accumulate to the sole use of the said M. B. and for the support of himself and family during his life.

It is further understood and to be taken as part of this conveyance that the property and premises hereby conveyed at the death of the said G. B., shall vest in the children of the said M. B., or in a trustee or trustees for their benefit, in such shares and proportions and in such estates as the said M. B. shall, by a conveyance or last will and testament, order and appoint. It is also to be further understood and taken as part of this indenture that the said M. B. shall have the power of ordering and appointing, or distributing or in trust for his children, the fee simple of said property, or less estate therein, either by a conveyance or by a last will and testament, subject to the aforesaid reservation and life interest, and in such shares and proportions and in such manner as he shall therein designate and direct; provided, however, that, at least, one-fourth part hereof shall be appointed to the use of the party hereto of the first part. It is hereby declared to be the intent and meaning of this indenture to invest the said M. B. with all the power and authority over three-fourths of said estate or property in distributing the same among his children, subject to said reservation and life interest, as the party of the first part would have had had not this indenture been executed.

And it is further understood to be taken as part of this indenture that if the power of appointment and distribution aforesaid shall not be exercised by the said M. B. during his life time that the said G. B., who on the death of the said M. B. without having by a con-

veyance or last will and testament exercised the power and authority hereby granted, shall have the same power and authority.

This indenture further witnesseth: That the said party of the first part, for and in consideration of the sum of ——— dollars to him in hand paid by the said party of the third part, the receipt whereof is hereby acknowledged and the said party of the third part forever discharged therefrom, hath granted, bargained, sold, assigned, transferred and set over and, by these presents, doth for himself, his heirs and assigns, grant, bargain, sell, assign, transfer and set over unto the said party of the third part, her heirs and assigns, all the estate, premises and property hereinbefore described and intended to be conveyed, if any, which are not legally vested in or conveyed to the party of the second part, his heirs and assigns, by virtue of the execution of this indenture, for the uses and purposes hereinbefore mentioned, or which can not be claimed by the beneficiaries under or through the trusts or persons or the execution thereof herein and hereunder to be legally intended to be legally created, authorized and executed, reserving and retaining, however, to the said party of the first part the use, possession, occupation, rents, issues and profits of the said property and premises for the period hereinbefore reserved and retained.

In witness whereof, etc.

Signed, sealed and delivered
in the presence of ———

Form 365.

Trust. Whole Property of Husband Convey on Marriage Settlement.

This indenture, made the ——— day of ———, A. D. 19—, between (*intended husband*), of ———, party of the first part; (*intended wife*), of ———, party of the second part; and ——— and ———, of ———, trustees, parties of the third part, witnesseth.

Whereas a marriage is intended shortly to be solemnized between the said (*intended husband*) and (*intended wife*), and upon the treaty for the said marriage it was agreed that the land, hereditaments, and premises hereinafter described, the property of the said husband, should be settled and assured to the uses, upon the trusts, and for the ends, intents, and purposes hereinafter limited and declared:

Now in consideration of the said intended marriage, and also in consideration of the sum of one dollar paid by the said trustees to the said husband, the receipt of which is hereby acknowledged,

he, the said husband, doth by these presents grant, release, and confirm unto the said trustees all that, etc. (*Description of land.*)

To have and to hold all and singular the premises hereinbefore described, with their appurtenances, unto the said trustees, and the survivor of them, their and his successor or successors, and their and his heirs, to the use of the said husband and his heirs until the solemnization of the said intended marriage; and after the solemnization thereof.

Upon trust that the said trustees, or the survivor of them, his executors or administrators, do and shall, with the consent of the said husband and wife during their joint lives, and, after the decease of either of them, with the consent of the survivor during his or her life, and, after the decease of such survivor, at the discretion of the trustees or trustee for the time being others and entire make sale and absolutely dispose of the said hereditaments and premises hereby granted and released, by public auction or private contract, either together or in parcels, with full power to buy in and resell the same without being in any manner liable for any loss that may be thereby incurred; and also to make, execute and deliver into all such contracts, deeds, conveyances, and assurances as may be deemed necessary, proper or expedient for the purpose of completing such sale or sales.

And it is hereby declared and agreed that the said trustees, or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of these presents, do and shall stand possessed of the moneys to arise from such sale or sales, upon the trust, and subject to the powers and provisions hereinafter expressed, limited and declared upon trust.

That they, the said trustees, or the survivors of them, his executors or administrators, or other the trustees or trustee for the time being of these presents, do and shall lay out and invest the said purchase moneys in bonds of the United States, or in real securities in the state of ———, or in or upon the shares, stock, or securities of any company incorporated under the laws of said state or of the United States, and regularly paying interest or dividends, with power from time to time for the said trustees or trustee of these presents with such consent or at such discretion as aforesaid, to alter, vary, and transpose the same as they or he may think fit and shall stand possessed of the said trust moneys, stocks, funds, and securities upon trust.

To pay the interest, dividends, and annual proceeds thereof, or permit the ame to be received by the said husband or his assigns for the term of his life.

And after his decease upon trust to pay the said interest, dividends, and annual proceeds, or permit the same to be received by the said wife and her assigns, for the term of her life, in case she

shall survive the said husband. And after her decease, upon trust, for the child, or for all or any such one or more of the children of the said marriage, in such parts, shares, and proportions as the said husband and wife shall by any deed or deeds, with or without power of revocation and new appointment, jointly appoint; and in default of such appointment, then as the survivor of them, the said husband and wife, shall, by any deed or writing, with or without power of revocation and new appointment, or by his or her last will, or any codicil or codicils annexed thereto, appoint. And in default of such last mentioned appointment, upon trust.

For all the children or any child of the said intended marriage, who being a son or sons shall attain the age of twenty-one years, or who being a daughter or daughters shall attain that age or marry, and, if more than one, in equal shares as tenants in common.

Provided always, that no child taking any portion of the said trust moneys and premises under the power of appointment hereinbefore limited shall be entitled to share in the unappointed part of the said trust moneys and premises without bringing his or her appointed share into hotchpot, and accounting for the same accordingly.

Provided always, and it is hereby declared, that it shall be lawful for the said trustees, or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of these presents, at any time after the decease of the survivor of them, the said husband and wife, at their or his discretion, to apply the whole or any part of the income of the presumptive share or shares to which any child or children of the said intended marriage shall be entitled under the trusts herein declared, towards the maintenance or education of such child or children, either directly or to his, her, or their guardian or guardians, without being required to see to the application thereof, or requiring any account of the same; and to apply the residue of such income, if any, in augmentation of the share or respective shares from which the same shall or may have arisen.

Provided also, and it is further declared, that it shall be lawful for the said trustees, or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of these presents, by and with the consent in writing of the said husband and wife, during their joint lives, and after the decease of either of them, then with the consent of the survivor, and after the decease of such survivor, then at the discretion of the trustees or trustee for the time being of these presents, to advance any part not exceeding one-half of the presumptive share or shares of such child or children in or towards his or her placing out in some pro-

fession, business, trade, or employment, or other advancement in the world.

Provided always, and it is hereby declared, that if there shall be no child of the said intended marriage, who being a son or sons shall attain the age of twenty-one years, or who being a daughter or daughters shall attain that age or marry, then the said trustees, and the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of these presents, do and shall stand possessed of the said trust moneys, stocks, funds, and securities;

Upon trust, for such person or persons, and for such ends, intents, and purposes, and in such manner or form (but without prejudice to the trusts hereinbefore declared in favor of the said wife), as the said husband shall from time to time, or at any time, by any deed or instrument in writing, with or without power of revocation and new appointment, or by his last will, or any codicil or codicils annexed thereto, appoint. And, in default of such appointment, upon trust.

For the said husband, his executors, administrators, and assigns, and to pay and assign over the same to him or them accordingly.

Provided always, and it is hereby moreover declared, that until all the said hereditaments and premises shall be sold, the said trustees and the survivor of them, his heirs, executors, and administrators, or other the trustees or trustee for the time being of these presents, do and shall pay and apply the net rents and profits of the same hereditaments and premises, or such part or parts thereof as shall not be sold, to the person or persons to whom the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities would be payable if such hereditaments and premises had been then sold, and the purchase moneys arising from such sale or sales had been so invested as aforesaid. In witness, etc.

Form 366.

Trust to Hold Real and Personal Property Conveyed by Intended Husband on Marriage Settlement.

This indenture made this ——— day of ———, 19—, between A. B. (*intended husband*), of the first part; C. D. (*intended wife*), of the second part; and E. F. and G. H., trustees, of the third part, witnesseth.

Whereas a marriage is expected will be shortly solemnized between the parties of the first and second parts, and upon the treaty of such marriage the said ———, party of the first part, in con-

sideration of the sum of ——— dollars to him by the said trustees paid, did covenant and agree to and with the said trustees that he would sell transfer, set over, and well and sufficiently convey unto the said trustees, all and singular the bonds, stock, and policies of life assurance, more particularly set forth and mentioned in the schedule hereto annexed, and would grant and convey the real estate or lot, piece or parcel of land, also more fully and particularly set forth and mentioned in the schedule aforesaid; and also did covenant and agree that he would execute a bond to the said trustees in the penal sum of ——— dollars, conditioned for the payment of ——— dollars on or before the ——— day of———, 19—, and for the purpose of securing the same did covenant and agree that would convey by way of mortgage to the said trustees all that certain piece, parcel, or part of land situate, lying, and being in the city of ——— and state aforesaid, bounded and described as follows, etc.:

Now, therefore, in consideration of the said intended marriage and of the said sum of ——— dollars to him paid as hereinbefore mentioned, the said party of the first part by these presents doth assign, transfer, set over, and convey unto the said trustees all and singular the bonds, stocks, policies of assurance on his life, and other choses in action, more particularly mentioned and set forth in the said schedule; and also doth by these presents give, grant, release, and forever quitclaim unto the said trustees all and singular that certain lot, parcel, or part of land also in the said schedule more particularly set forth and described; and also, by way of mortgage, all and singular that certain piece, parcel, or part of land more particularly set forth and described in the recital of these presents, together with all and singular the rights, privileges, and appurtenances to the said property, and each and every part thereof, according to its respective kind and nature, appertaining or in any way belonging:

To have and to hold all and singular the said property, which shall be hereinafter designated as the "settled property," to the said trustees, and the survivor of them, and their and his successor or successors in said trust, and, according to the nature and kind of the same, to their and his heirs, executors, administrators, and assigns, forever. In trust, nevertheless, to and for the following uses, trusts, intents, and purposes, and to no other use, trust, intent, or purpose whatsoever, that is to say, till such intended marriage is duly had and solemnized, to the use of said party of the first part, and, according to the nature and kind of the said settled property, to his heirs, executors, administrators, and assigns; and from and immediately after such intended marriage, in trust to and for the sole, separate, and exclusive use of the said wife, free from liabilities dominion or control of

the said husband; and for and during the term of their joint lives respectively, her receipt for the income, dividends, interest, or other yearly proceeds, when actually due, shall be a sufficient acquittance and discharge therefor to the said trustee; and from and after the death of the said wife, the said husband surviving her, then in trust for the use, benefit, and behoof of him, the said husband, till he shall either die, or till he begin, or any one or more of his creditors shall begin proceedings for the purpose of having him adjudged a bankrupt, or insolvent debtor, and he be adjudged or declared such bankrupt or insolvent debtor; or till he shall take the benefits of the present or any future law, act, or acts for the relief of insolvent debtors, or enter into a compromise with his creditors for the payment of any debts which he may now or at any time hereafter owe, or mortgage, sell, assign, charge, or in any manner whatsoever, by way of anticipation or otherwise, dispose of the said settled property, or any part thereof, or the interest, income, dividends, profits, or other yearly proceeds arising therefrom, or any part thereof; or till any other act or event shall happen, either by or through his own act or default, or the act or default of any person or persons whomsoever, or by operation of law, whereby the said settled property or any part thereof, or the interest, income, profits, or other yearly proceeds arising therefrom, if continuing to the use and behoof of him, the said husband, and payable to him, would vest, or become liable to vest, in any other person; or till any creditor or creditors of the said husband shall, by any process in law or equity or legal proceeding or otherwise, attempt to subject the settled property or any part thereof, to the payment of the debts of the said husband, or any one or all of such debts. And from and immediately after the death of him, the said husband, or the sooner determination of his interest in the said settled property or any part thereof, as hereinbefore provided, he having survived his said wife, then in trust to keep the said settled property invested, and the annual proceeds and income arising therefrom to collect and apply to the support, maintenance, and education of the child or children of the said husband and wife living at the time o fthe determination of his interest in the settled property, or which may come from thereafter, till the youngest child shall reach the age of twenty-one years, in such share and proportions as the said husband from time to time, and at all times during his life interest, or by his last will and testament, shall appoint. But if the said wife shall have died before the death of the said husband, and there shall be no such child or children, then in trust to hold the said settled property for the use, benefit, and behoof of, or to convey the same to, such person or persons and for such use and uses, and upon such trusts, limitations, condi-

tions, and provisions, as the said husband, by any deed or instrument in writing executed by him under seal in the presence of two or more witnesses, or by his last will and testament, shall direct, limit, and appoint.

But in case the said wife shall survive her said husband, then in trust, to convey and vest the settled property in the executor or executors of the last will and testament of the said husband, for the use, benefit, and behoof of such person or persons as he may thereby appoint, subject to the limitations and provisions therein contained: provided always, nevertheless, that the said settled property shall in no way be subject or liable for the debts which he, the said husband, may owe at the time of his death; and failing such last will and testament, or such appointments therein, in case he leave issue surviving him, then to keep all and singular the said settled property invested, and to pay to the said wife the income arising therefrom, to be by her applied to her own use and that of such issue, in such way and proportions as she may consider advisable, for and during the joint lives of her, the said wife, and the longest liver of such issue; and if she, the said wife, shall survive all such issue, then to pay to her the whole income, and to convey to her the principal, upon the conditions and provisions hereinafter provided in case he, the said husband, shall leave no such issue. An from and immediately after the death of the said wife, issue of the said husband surviving her, then to keep all and singular the said settled property invested till the youngest child of the said husband shall be or become of the age of twenty-one years, and then to divide the income equally among them; and upon the happening of such last said event, tehn to convey or divide the principal of the said property to and among the issue of the said husband living at the time of such division, the issue of any deceased child taking by representation. But in case the said husband shall leave his said wife surviving him, and leave no issue living at the time of his death, or in case he leave such issue and the longest time of his death, or in case he leave such issue and the longest liver of such issue predecease his said wife, then from and immediately after the death of the said husband, or from and immediately after the death in the lifetime of the said wife of the longest liver of such issue, in trust to convey by proper deed one moiety of the said settled property unto the said wife, for her own use absolutely, and the income of the other moiety to pay to her during her life, and after her death to convey this last moiety unto and among the next of kin of the said husband who may be living at the death of the said wife.

In witness etc.

Form 367.

Ante Nuptial Trust Providing for Settlement of Wife's After Acquired Property.

This indenture, etc.

It is hereby declared, covenanted and agreed that if the said (*wife*) at any time during the said intended coverture shall become entitled to any real or personal property other than the property hereby specifically settled, except property of a less value than ——— dollars, and except movable chattels or effects of household domestic, or personal use or ornament, all of which excepted property it is hereby declared shall be and remain the absolute property of the said (*wife*), then, and as often as the same shall happen, all such real and personal property, except as aforesaid, shall, at the cost of the trust estate, be immediately assured or transferred to the said trustees or trustee, upon trusts as nearly corresponding with the trusts hereby declared of the property hereby settled as may be, and so that such real property shall be impressed with a trust for conversion into money, and be settled as personal estate.

Form 368.

Trust for Husband and Wife Providing for Sale of Real Estate.

This indenture, etc.

Grants, etc.

Upon trust that the said trustees or the survivors or survivor of them, or the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents, hereinafter called the said trustees or trustee, shall, at the written request of the said (*husband*) and (*wife*) or the survivor of them, during their, his or her life, and, after the decease of such survivor, at the discretion of the said trustees or trustee, sell the said hereditaments and premises hereby assured, either subject to any charges affecting the said premises or not, and either together or in parcls, by public auction or private contract, and subject to such conditions as they or he shall deem proper or advisable, with power to buy in or rescind or alter any contract for sale, and resell without being liable in any manner for loss, and for the purposes aforesaid, or any of them, to execute and do all such assurances and things as they or he shall think proper or advisable.

Form. 369.

Marriage Settlement. Appointment of New Trustees.

This indenture, etc.

It is hereby declared, covenanted and agreed that the power of appointing a new trustee or trustees of these presents in the place and stead of any trustee or trustees who shall die or desire to be discharged, or refuse, or become unfit or incapable to act, shall be exercisable by the said husband and wife during their joint lives, and by the survivor of them during the life of such survivor, and, after the death of such survivor, by the surviving or continuing trustees or trustee for the time being, or by the last retiring trustees or trustee; and upon every or any such appointment the number of trustees may be increased or reduced, but not to less than two.

Form 370.

Intended Wife's Release of all Interest in Husband's Property on Receipt of Specified Sum.

Where said parties contemplate a marriage and have fully considered the subject.

Parties of their pecuniary condition, and situation, their prospects and desires, their mutual rights and obligations, now they hereby mutually covenant and agree each with the other binding themselves, their executors, administrators and heirs as follows:

The said ——— (*intended husband*) in consideration of the promise of said ——— (*intended wife*) to marry him and of the consumation of said promised marriage and of her agreements herein contained, covenants and agrees that he will upon his decease pay, cause to be paid, or provide that there will be paid to her, if she is then living, $50,000 in good and lawful money of United States within one year after his death; and she the said ———, in consideration that said contemplated marriage be consummated and of the covenant of said ——— hereinbefore contained ——— covenants and agrees to and with said ——— his executors, administrators and heirs that she will, upon the death of said ———, take, receive and accept said $50,000, in full of all rights of dower in or to his estate and in full of all other rights, interests, claims, or allowance in law or in equity into or upon his estate, real and personal, which she might or could have or be entitled to if this agreement had not been made.

That on payment to her of said $50,000 by the executor of the will or the administrator of the estate or by the heirs of said

——— within one year from the date of his death, she will release, quitclaim and discharge to his representatives or heirs all rights of dower and every and all other rights, claims, interests in law and equity which she might or could have in or to his estate or property, or any part thereof in the absence of this agreement.

To which covenants and agreements said parties mutually bind themselves their executors, administrators and assigns.

Signed and sealed by both and acknowledged by both before ———, justice of the peace.

Form 371.

Trust to Hold Land on Postnuptial Settlement for Such Uses as Wife May Appoint.

This indenture made the ——— day of ———, A. D. 19—, between A. B. of ———, and C. D., his wife, of the one part, and E. F. of ———, and G. H. of ———, trustees, of the other part, witnesseth:

Whereas ———, late of ———, deceased, by his last will, dated on or about the ——— day of ———, amongst other devices and bequests, devised the lands and premises hereinafter described unto the said ———, wife of said ———, her heirs and assigns forever, and whereas

The said ———, wife of the said ———, intermarried with her said husband on or about the ——— day of ———, in the year ———, but no settlements either previously or subsequently to the said marriage hath ever been made; and whereas

The said ———, and ———, his wife, are desirous of settling and assuring the said lands and premises to the uses, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared:

Now, for the purpose of effectuating said desire, and in consideration of the sum of one dollar paid by the said trustees to the said A. B., and C. D., his wife, on the execution hereof, the receipts of which is hereby acknowledged, they, the said A. B., and C. D., his wife, do by these presents grant, release, and confirm unto the said trustees and their heirs all that, etc., and all the estate, right, title, and interest, both legal and equitable, of them, the said ———, and ———, his wife, therein.

To have and to hold the said devised lands, and all and singular other the lands and premises hereinbefore described and hereby granted and released, with their appurtenances, unto the said trustees, and the survivor of them, and their and his heirs, to the uses, upon the trusts, and for the ends, intents, and pur-

poses hereinafter limited, expressed, and declared of and concerning the same, that is to say:

To such uses, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisos, charges, declarations, and agreements, as the said C. D., wife of the said A. B., shall from time to time, or at any time, and notwithstanding her present or any future coverture, by deed or will direct, limit, appoint, give, or devise; and in default of and until such direction, limitation, appointment, gift, or devise, and so far as such direction, limitation, appointment, gift, or devise, if incomplete, shall not extend,

To the use of the said C. D., wife of the said A. B., for and during the term of her natural life, free from the control, debts, or engagements of her present husband, the said A. B., or of any future husband or husbands with whom she may at any time intermarry; and after her decease, in case her husband shall happen to survive her,

To the use of the said husband and his assigns for and during the term of his natural life; and after the decease of the survivor of them, the said ———, and ———, his wife.

To the use of the heirs at law of the said ———, the wife of the said ———, forever, and to, for, and upon no other use, trust, and intent or purpose whatsoever.

In witness, etc.

Form 372.

Deed to a Trust Company in Trust for the Benefit of the Grantor and others.

This indenture, made the ——— day of ———, 19—, between A. B. of ———, in the county of ———, party of the first part, and the C. D. Trust Company, a corporation organized under the laws of the State of ———, party of the second part, witnesseth, that in consideration of ten dollars and other valuable considerations to him paid by said party of the second part, the said party of the first part hereby gives, grants, bargains, sells, conveys, transfers, assigns, and sets over unto said party of the second part all his interest in the estate of his late father, E. F., deceased, at the time of his death a resident of ———, whether real or personal, and of whatever kind or nature: To have and to hold the same, with all the privileges and appurtenances belonging thereto, to the said party of the second part, its successors and assigns, to its and their own use, forever, but in trust nevertheless, as follows: In trust, to pay the net income thereof at least quarterly, after deducting all necessary charges and expenses,

and a reasonable compensation for the care of the property, to the said party of the first part during his life, and after his death to pay the principal thereof to such person or persons as the said party of the first part shall by his last will and testament, duly executed, direct and appoint. And in case the said party of the first part shall die not making any appointment as aforesaid by his last will and testatment, then to pay the net income thereof to the widow of said party of the first part, if any he shall leave, during her life; and after her death to divide the principal thereof among the surviving children of said party of the first part, if any, the issue of any deceased child to take in place of the parent by right of representation. And in case said party of the first part shall die leaving no widow and no children, or issue of any deceased children, and shall make no will or appointment as aforesaid, then to divide the principal of said trust fund among the heirs at law of said party of the first part.

The party of the second part as aforesaid shall hold the said trust separate and apart from other trust property held by it, and may at its discretion sell any part or the whole of the said real or personal estate at public or private sale, and transfer and convey the same by proper deeds or instruments, and collect and receive the proceeds of said sale; and, after deducting therefrom the expenses of such sale and conveyance, invest the remainder thereof in such property and securities as said trustee shall deem best, and in such property as unincorporated or individual trustees are now authorized to invest and hold trust property in; and to hold said proceeds and the property in which the same may be invested upon the same trusts as are hereinafter set forth.

The said party of the first part to enable the fulfillment of the terms, provisions and conditions of this indenture does hereby constitute and appoint the said party of the second part, and its successor and successors, his attorney irrevocable to collect and receive from ———, the administrator of the estate of his deceased father, or any other administrator or administrators thereof, all moneys, bonds, certificates of stock, and personal property of any kind which are coming to him as his share of the estate of his said father, and the income thereof; and the receipt of said trust company shall be a full discharge to the said administrator or administrators of all or his or their liability to the said party of the first part in respect to the said property; he hereby giving full power to his said attorney for him and in his name and behalf to receipt for the same, and to acknowledge and to make, execute and deliver any and all deeds and other instruments by writing which may be fit or proper in the premises; and otherwise to act in and concerning the premises as fully as the said party of the first part could himself do if personally present

and acting. Said party of the second part hereby joins in this instrument for the purpose of accepting the trust hereinbefore described. In witness, etc.

Form 373.

Wife's Deed of Confirmation, on attaining Twenty-one Years, of a Settlement made by her while an Infant.

Know all men by these presents, that, whereas an indenture dated the ——— of ———, 19—, and was made between my husband, A. B., of the first part, myself of the second part, and ——— and ———, trustees, of the third part, being the settlement executed in contemplation of the then intended marriage which was shortly afterwards solemnized between my said husband and myself; and whereas I attained the age of twenty-one years on the ——— day of ——— last, and I have agreed to ratify and confirm the said settlement in the manner hereinafter appearing: Now in pursuance of the said agreement, and in consideration of the provision made in my favor by my said husband, I do hereby ratify and confirm the said settlement with respect to the trust funds thereby expressed to be thereby assigned by me; to the intent that the said settlement shall take effect as fully and effectually in all respects as if I had been, at the time of the execution thereof, of the full age of twenty-one years. In witness, etc.

Form 374.

Appointment of a New Trustee in Place of a Deceased Trustee under a Marriage Settlement, to be indorsed on Instrument.

This indenture made the ——— day of ———, 19—, between the within named ———, surviving trustee, of the first part; the within named ———, and ———, his wife, formerly ———, within named, of the second part; and ——— of ———, new trustee, party of the third part witnesseth. Whereas a marriage between the two parties of the second part was duly had and solemnized shortly after the execution of the within written settlement; and whereas ———, one of the trustees in the within written indenture, died on the ——— day of ———; and whereas the said surviving trustee, with the consent of the said parties of the second part, desires to appoint the said ——— to be a trustee of the within written indenture in place of the deceased trustee: Now in the exercise of the power for this purpose contained in the within written indenture, and of every other power

them in this behalf enabling, he, the said surviving trustee, does hereby, with the consent of the said parties of the second part, hereby testified, appoint the said ——— to be a trustee in place of the said deceased trustee, for the purposes of the within written indenture, or such of the same purposes as may be subsisting and capable of being effectuated; and it is hereby agreed and declared that the said ———, surviving trustee, and the said ———, new trustee, their executors, administrators, and assigns, shall hold upon the trusts of the within written indenture the stocks, funds, securities, and property mentioned in the schedule hereto annexed, which now constitute the trust estate created by the within written indenture, which said stocks, funds, securities, and property it is intended shall be forthwith, or as soon as may be, transferred, so as to be vested in the said surviving trustee and new trustee jointly, upon the trusts and subject to the powers and provisions applicable thereto, set forth in the within written indenture. In witness, etc.

Form 375.

Deed by Wife confirming Marriage Settlement made while an Infant.

This indenture made this ——— day of ———, between ——— (*wife*), formerly ———, and now wife of the within named ——— (*husband*), of the first part, the said ——— (*husband*) of the second part, and the within named ——— (*trustees*), of the third part witnesseth. Whereas the marriage of said parties of the first and second parts was duly had and solemnized on the ——— day of ———, and the said wife attained the age of twenty-one years on the ——— day of ———, and now has agreed to ratify and confirm the said settlement: Now the said ——— (*wife*), in consideration of the premises with the approbation of the said ——— (*husband*), hereby ratifies and confirms the settlement made the ——— day of ———, whereby she conveyed to said trustees the hereditaments and premises therein described upon the trusts, powers and covenants therein contained, to the intent that the said indenture shall take effect in the same manner in all respects as if the said ——— (*wife*) had been of full age at the date of said settlement. Therefore the said ——— (*wife*), with the approbation of the said ——— (*husband*), hereby grants and conveys unto said trustees all the within described premises, situate in the town of ——— in the county of ——— and state of ———: To hold the same unto and to the use of said trustees, their heirs and assigns, upon the trusts and subject to the powers and provisos in said indenture of settlement declared and set out,

so far as the same are capable of being effectuated. In witness, etc.

———————,

Form 376.

Deed of Trust to Secure Loan.

This deed of trust, made this ——— day of ———, 19—, between ——— the part ——— of the first part, and ——— the part ——— of the second part, and ——— the part ——— of the third part, witnesseth: Whereas, the said ——— ha— borrowed and received of the said ——— in gold coin of the United States, of the present standard, the sum of ——— dollars, and ha ——— agreed to repay the same, with interest, to ——— or ——— order, in like gold coin, according to the terms of ——— certain promissory note —— of even date herewith, executed and delivered therefor by the said ———. Now this indenture witnesseth: That the said part ——— of the first part, in consideration of the aforesaid indebtedness to ——— and of One Dollar to ——— in hand paid by the part ——— of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of said promissory note ——— and of any sum or sums of money, with the interest thereon, that may be paid or advanced by, or may otherwise be due to the part ——— of the second part or part ——— of the third part, under the provisions of this instrument, and also such additional sums as may be hereafter borrowed and received by the said ——— from the part ———of the third part, and evidenced by another promissory note of the said ——— ha— granted, bargained, sold, conveyed and confirmed and do— hereby grant, bargain, sell, convey and confirm unto the part ——— of the second part in joint tenancy, and to the survivor— of ———, ——— successor— and assign— the piece— or parcel— of land situate in the ——— County of ———, State of California, described as follows: And also, all the estate and interest, homestead, or other claim or demand, as well in law as in equity, which the said part ——— of the first part now ha— or may hereafter acquire of, in and to the said premises, with the appurtenances;

To have and t ohold the same to the part ——— of the second part, as joint tenants (and not as tenants in common), with rights of survivorship as such and to ——— successor— and assign— upon the trusts and confidence hereinafter expressed, to wit:

First.—During the continuance of these Trusts, the part ——— of the third part and the part ——— of the second part, their successors and assigns are hereby authorized to pay without previous

notice, all taxes, assessments and liens now subsisting, or which may hereafter be imposed by National, State, County, City or other authority, or which may appear prima facie to subsist or be imposed upon said premises, to whomsoever assessed (excepting such taxes and assessments as may be levied or imposed in accordance with Article XIII of the Constitution of this State, ratified at the election held May 7th, 1879, upon this deed of trust or the money secured hereby, and whether so levied or imposed thereon as an interest in the property affected hereby or otherwise), and all or any incumbrances now subsisting or that may hereafter subsist thereon, which may, in their judgment, affect said premises or these trusts, at such time as in their judgment they may deem best; or, in their discretion, for the benefit and at the expense of said part ——— of the first part, to contest the payment of any such taxes, assessments, liens or incumbrances, or defend any suit or proceeding instituted for the enforcement thereof; and in like manner to prosecute or defend any suit or proceeding that they may consider proper to protect the title to said premises; and to keep the buildings now erected or which may hereafter be erected on said premises, insured against loss by fire in the sum of ——— dollars (or less in their discretion), with such company or companies as they may deem proper, loss, if any, payable to the part ——— of the third part; and these trusts shall be and continue as security to the part ——— of the third part and of the second part, and their successors and assigns, for the repayment, in gold coin of the United States, of the moneys so borrowed by the said ——— and the interest thereon, and of all amounts so paid out, and costs and expenses incurred as aforesaid, whether paid by the part ——— of the second part or part ——— of the third part, with interest on such payments at the rate of one per cent. per month until final repayment, which disbursement and interest the part ——— of the first part hereby agree— to pay.

Secondly.—In case the said ——— shall well and truly pay, or cause to be paid, in Gold Coin as aforesaid, all sums of money so borrowed as aforesaid, and the interest thereon, and shall upon demand repay all other moneys secured or intended to be secured hereby, and, also, the reasonable expenses of this Trust, then the part ——— of the second part, the survivor— of ———, ——— successor— and assign— shall reconvey all the estate in the premises aforesaid to ——— by this instrument granted unto ——— and assigns at ——— request and cost.

Thirdly.—If default shall be made in the payment of any of said sums of principal or interest, when due, in the manner stipulated in said promissory note—, or in the reimbursement of any amounts herein provided to be paid, or of any interest thereon,

then the said part ——— of the second part, or the survivor— of ———, ——— successor— or assign— on demand by the part ——— of the third part, or ——— assigns shall sell the above granted premises, or such part thereof as, in ——— discretion, ——— shall find it necessary to sell in order to accomplish the objects of these Trusts, in the manner following, namely:

The Trustee— shall first publish the time and place of such sale, with a description of the property to be sold, at least once a week for four successive weeks, in some newspaper published in the County seat of the County wherein said property or a portion thereof is situated, and may from time to time postpone such sale by publication; and, on the day of sale so advertised, or to which such sale may be postponed, may sell the property so advertised, or any portion thereof, at public auction, at the time and place specified in the published notice, to the highest cash bidder, and the holder or holders of said promissory note—, ——— agent or assigns, may bid and purchase at such sale.

The Trustee— may sell said premises, as above described as a whole, or, in ——— discretion, in such reasonable parcels or subdivisions as ——— in ——— judgment may deem advisable.

And the part ——— of the second part or the survivor— of ——— ———, successor— or assign—, shall establish as one of the conditions of such sale, that all bids and payments for said property shall be made in like Gold Coin as aforesaid, and upon such sale ——— shall make, execute, and after due payment made, shall deliver to the purchaser or purchasers, his or their heirs and assigns, a Deed or Deeds of the premises so sold, and out of the proceeds thereof shall pay:

First.—The expenses of such sale together with the reasonable expenses of this Trust including counsel fees of ——— Dollars, in Gold Coin, which shall become due upon any default made by the said ——— in any of the payments aforesaid.

Second.—All sums which may have been paid, under or in accordance with the provisions hereof, by the said part ——— of the third part or the part ——— of the second part, ——— successor— or assign—, or the holder or holders of the note— aforesaid, and not reimbursed, which may then be due, whether paid on account of incumbrances or insurance as aforesaid, or in the performance of any of the Trusts herein created, together with any additional sums borrowed as aforesaid, and with whatever interest may have accrued thereon; next, the amount due and unpaid on said promissory note—, with whatever interest may have accrued thereon, and lastly, the balance or surplus of such proceeds, if any, to said part ——— of the first part or assigns.

And in the event of a sale of said premises, or any part thereof, and the execution of a deed or deeds therefor, under these Trusts,

then the recitals therein of default and publication of notice of sale, and a demand by the part ——— of the third part, ——— successor— or assign—, that such sale should be made, shall be conclusive proof of such default and of the due publication of such notice, and that the sale was made on due and proper demand by the part ——— of the third part, ——— successor— or assign—; and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against the said part ——— of the first part, ——— or assigns, and all other persons as to such default, publication and demand; and the receipt for the purchase money contained in any deed executed to the purchaser, as aforesaid, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money, according to the Trusts aforesaid.

It is expressly covenanted that the part ——— of the third part may, from time to time, appoint other Trustee or Trustees to execute the trusts hereby created; and upon such appointment, and a conveyance to ——— by the part ——— of the second part, or the survivor— of ———, ——— successor— or assign— the new Trustee— shall be vested with all the title, interests, powers, duties and trusts in the premises, hereby vested in or conferred upon the part ——— of the second part. Such new Trustee— shall be considered the successor— and assign— of the part ——— of the second part within the meaning hereof.

If a corporation, a copy of such resolution, certified by the Secretary of the party of the third part, under its corporate seal, and attached to the instrument of assignment or transfer, shall be conclusive proof of the proper appointment of such substituted Trustee or Trustees.

In witness whereof, etc.

Form 377.

Deed of Trust to Trustees of Savings Bank.

This indenture, made and entered into this ——— day of ———, A. D. 19—, between A. B. the party of the first part, and C. D., and E. F., both of the City of ———, the parties of the second part, and ——— Savings Bank, a corporation, organized under the laws of the State of ———, the party of the third part, witnesseth: That the said party of the first part has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell and convey unto the parties of the second part in joint tenancy, and to the survivor of them, their successors and assigns, all that certain real property situated in the ——— County of ———. State of ———, and described as follows, to wit: ——— To-

gether with all and singular the tenements, hereditaments and appurtenances thereunto belonging or hereafter to be placed thereon, or in anywise appertaining; hereby abandoning all right of homestead in and to said premises, and agreeing to warrant and defend the title to the same.

To have and to hold unto the said parties of the second part, as joint tenants, with right of survivorship as such, their successors and assigns, in trust nevertheless, for the uses and purposes hereinafter limited and described, namely:

To secure the payment to the said party of the third part of the sum of ——— Dollars, gold coin of the United States, and interest thereon, according to the terms of ——— certain promissory note— made and executed by the said party of the first part, and payable to the order of the said party of the third part; also to secure the payment of any and all sums of money, checks, bills, promissory notes, bonds, loans, balances of account, overdrafts or other indebtedness which are now, or which may hereafter, during the continuance of this trust, be or become due or owing from the party of the first part (or either of them) to the party of the third part, or for which said party of the first part (or either of them) may be, or shall become in any way liable to said party of the third part, together with interest on all such indebtedness from the date of the creation of the same to the day of repayment to the party of the third part, at the rate of one per cent per month, or such other rate as may be agreed upon where the indebtedness is evidenced by an instrument in writing. Also, to secure the repayment, on demand, of any sum or sums advanced at any time during the continuance of the trust by party of the third part, for the payment of any taxes, assessments, liens and incumbrances now subsisting, or which may hereafter be levied or imposed upon said premises, or any part thereof, which may, in the judgment of the party of the third part, affect said premises or this trust. Also, to secure the repayment, on demand, of any and all sums paid out by party of the third part, or parties of the second part, for insurance of said premises, or any part thereof, against loss by fire in such amount as they may deem necessary for their security, loss, if any, payable to party of the third part. Also, to secure the repayment, on demand, of any and all sums paid out by parties of the second or third part in intervening in, prosecuting or defending any action or proceeding, whenever, in their judgment, it may be necessary to do so in order to protect the title to said property, or this trust. Also, to secure the repayment by party of the first part, of the expenses incurred for such repairs or prevention of waste upon said premises as may have been deemed necessary by party of the third part or its assigns. Also, to secure the payment of interest on all of said advances and

expenses from the time they are made or incurred to the time of repayment, at the rate of one per cent per month, or such other rate as may be expressly agreed upon in writing.

All indebtedness and advances not evidenced by any instrument in writing wherein it is otherwise provided, and the interest thereon shall be due and payable, on demand, in United States gold coin.

The party of the first part has full notice that the parties of the second part are stockholders in and officers of the party of the third part, and hereby consent that they act as Trustees and parties of the second part, and waive all objections thereto.

In case the party of the first part shall well and truly pay or cause to be paid at maturity to the party of the third part, or its successors or assigns, the promissory note—and all other indebtedness hereinbefore mentioned, when the same shall become due, with interest as hereinbefore specified, and all sums paid out and expended, together with interest, on demand, as hereinbefore provided, then the parties of the second part, the survivor of them, their successors and assigns, shall reconvey all the estate in said premises, to them by this instrument granted, to the party of the first part, his heirs or assigns, at his request and cost.

If default shall be made in the payment of said note—first mentioned and interest when due, or any indebtedness evidenced by any instrument in writing, as aforesaid, or in the reimbursement of any moneys as herein provided to be paid out and expended, or any advances for taxes, liens, incumbrances, insurance, etc., or any other sum due to party of the third part, with the interest thereon, on demand, as hereinbefore expressed, then it shall be lawful for the said parties of the second part, or the survivor of them, their successors or assigns, on the application of the party of the third part, or its assigns, to sell the above granted premises, or such part thereof as in their discretion they shall find it necessary to sell in order to accomplish the objects of this trust in the manner following, to wit:

They shall publish notice of the time and place of such sale, with a description of the property to be sold, at least one time a week for three successive weeks, in some newspaper published in the County of Sacramento, State of California, and may from time to time postpone such sale by publication, and on the day of sale so advertised, or to which such sale may be postponed, at the place named, they may sell the property so advertised, as a whole or in subdivisions, as the parties of the second and third party may deem best, at public auction, in any county where any part of said property may be situated, or in the City of Sacramento, to the highest bidder for cash, in United States gold coin; and at such sale the holder of any note or instrument in writing, or of

any of the indebtedness, or any one who has made any of the advances hereinbefore mentioned, or the party of the third part, may bid and purchase the whole or any part of said premises.

And the parties of the second part, or the survivor of them, their successors or assigns, are hereby authorized to execute and shall execute, and after due payment made, shall deliver to the purchaser or purchasers at such sale deed or deeds of grant for the property so sold, and in any such deed are authorized to recite any and every matter of fact necessary to authorize such sale and deed, and such recital shall be conclusive evidence against party of the first part of the existence of the matters so recited, and of every other matter or fact necessary to authorize such sale, whether such matter or fact is recited in such deed or not, and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said party of the first part, their heirs and assigns, and all other persons. And the receipt for the purchase money contained in any deed executed to a purchaser at such sale, as aforesaid, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money according to this trust.

Out of the proceeds of such sale the parties of the second part shall—

First: Pay the expenses of sale, including the cost of publication and a counsel fee of ——— in United States gold coin, which shall become due upon default made by party of the first part in any of the payments aforesaid.

Second: They shall retain a sufficient sum to discharge all the indebtedness and interest due from part ——— of the first part to party of the third part or its assigns, as hereinbefore specified; and all sums which may have been advanced or expenses incurred by party of the third part, or parties of the second part, for any of the purposes hereinbefore specified, with the interest thereon, and apply the same in pursuance of this trust.

Third: The surplus, if any, they shall pay to the party of the first part, his successors or assigns, on demand.

It is expressly covenanted that the party of the third part may, by resolution of its Board of Directors, from time to time appoint other Trustee or Trustees to execute the trusts hereby created; and upon such appointment and a conveyance to them by the parties of the second part, the survivor of them, their successors or assigns, the new trustees shall be vested with all the title, interest, powers, duties and trusts in the premises hereby vested in or conferred upon the parties of the second part. Such new Trustees shall be considered the successors and assigns of the parties of the second part, within the meaning hereof. A copy of such resolution, certified by the Secretary of the party of the

third part, under its corporate seal, and attached to the instrument of assignment or transfer, shall be conclusive proof of the proper appointment of such substituted Trustee or Trustees.

In witness whereof, etc.

We hereby accept the trust imposed upon us by the foregoing instrument. Witness our hands this ——— day of ———, 19—.

.....
Trustee.

.....
Trustee.

Form 378.

Reconveyance.

Whereas, The indebtedness secured to be paid by ——— Deed of Trust, dated ———, 19—, executed by ——— to ———. Recorded in the County Recorder's Office of the County of Sacramento, State of California, in Book ——— of Trust Deeds, at page ——— is ——— paid. Now, in consideration of such payment and the sum of One Dollar to us paid, we, as Trustees, do remise, release and reconvey unto ——— heirs and assigns ——— the estate derived to us through said Deed of Trust in the land situated in the said county, described as follows ———: Also the tenements and appurtenances thereunto belonging. To have and to hold the same without any warranty unto the said ——— heirs and assigns forever.

In witness whereof, we have hereunto set our hands and seals the ——— day of ———, 19—.

.....Trustee. [SEAL]
.....Trustee. [SEAL]

Form 379.

Trust Deed to secure Bonded Indebtedness—Land, Mining Claims, etc.

This indenture, dated as of the first day of———, A. D. ——, and made and entered into at the City and County of San Francisco, State of California, United States of America, by and between A. B. Company, a corporation incorporated, organized and existing under and by virtue of the laws of the said State of California, and having its office and principal place of business in the said City and County of San Francisco (hereinafter sometimes called the "Company"), the party of the first part, and C. D. Trust Company of San Francisco, a corporation incor-

porated, organized and existing under and by virtue of the laws of the said State of California, and having its office and principal place of business in the said City and County of San Francisco (hereinafter sometimes called the "Trustee"), the party of the second part, witnesseth:

Whereas, at a special meeting of the Board of Directors of the Company, duly called, convened and held on the ——— day of ———, A. D. ———, in Room No. ———, in the Pennsylvania Commercial Building, situated on the northwest corner of ——— and ——— Streets, in the said City and County of San Francisco (the same being the principal place of business and the office of the Company and at the building and the room in the said building where the Board of Directors of the Company usually meet), at which said meeting of the said Board of Directors a majority of the members thereof were present, the said Board of Directors duly and unanimously passed and adopted resolutions ordering and calling a meeting of the stockholders of the Company, to be held at the said office of the Company, on Thursday, the ——— day of ———, A. D. ———, at the hour of 10 o'clock A. M. of that day, for the purpose of considering and acting upon a proposition to create a bonded indebtedness of the Company in the amount or principal sum of ———, with interest thereon at the rate of six (6) per cent. per annum, both principal and interest to be payable in gold coin of the United States of America, of or equal to the present standard of weight and fineness (if paid in the said City and County of Can Francisco, or in the City of New York, State of New York, United States of America), or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4.865) per pound (if paid in the City of London, England), to the end and for the purpose of providing means and raising moneys to pay for property, including shares of the capital stock of other corporations, acquired and received and to be acquired and received by the Company, and to pay for labor done and to be done for the Company, and to pay the indebtedness incurred and to be incurred by the Company (including the payment or discharge of the outstanding First and Consolidated Mortgage, Series A, Six Per Cent., Sinking Fund, Twenty Year, Gold Bonds, of the Company, and the payment or discharge of the outstanding bonds of other corporations, the payment of which said outstanding bonds of other corporations has been assumed by the Company), and for other legitimate and necessary purposes, the payment of the said bonded indebtedness proposed to be created to be secured by a mortgage or deed of trust upon and of all the property, real and personal, of every kind and nature whatsoever, owned by and belonging to the

Company at the date of the said mortgage or deed of trust, and also upon and of all the property, real and personal, of every kind and nature whatsoever, thereafter in any manner acquired by the Company during the life or term of the said mortgage or deed of trust, and ordering and directing the Secretary of the Company to cause a notice of the said meeting of the said stockholders to be given to the said stockholders by publication in ———, a newspaper of general circulation printed and published daily, holidays excepted, in the said City and County of San Francisco (the by-laws of the Company not prescribing the paper in which notices of meetings of the Board of Directors or of the stockholders of the Company are to be published), once a week for at least sixty (60) days before the day appointed for the said meeting of the said stockholders, namely, the said ——— day of ———, A. D. 19—, the said notice to specify the object of the said meeting of the said stockholders and the time and place of holding the said meeting of the said stockholders, and to state the amount of the said bonded indebtedness which it was proposed to create, and further ordering and directing the said Secretary, in addition to such notice by publication, to address, and to mail at the United States Post Office, in the said City and County of San Francisco, with the postage thereon fully prepaid, a like notice to each of the said stockholders of the Company whose names appear on the books of the Company as sufficiently addressed or identified, at his place of residence, if known, and if not known, then at the place, namely, the said City and County of San Francisco, in which the principal place of business of the Company is situate, at least thirty (30) days before the said day appointed for the said meeting of the said stockholders; and

Whereas, in pursuance of the said resolutions, a notice specifying the time and place of the said meeting of the said stockholders, namely, the said ——— day of ———, A. D. ———, at the hour of 10 o'clock A. M. of that day, at the said office of the Company, in the Pennsylvania Commercial Building, situated on ——— of ——— and ——— Streets, in the said City and County of San Francisco, and specifying the object of the said meeting of the said stockholders, namely, for the purpose of considering and acting upon a proposition to create a bonded indebtedness of the Company in the said amount or principal sum of ——— with interest thereon at the rate of six (6) per cent, per annum, both principal and interest to be payable in gold coin of the United States of America, of or equal to the present standard of weight and fineness (if paid in the said City and County of San Francisco, or in the said City of New York), or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-

thousandths dollars ($4.865) per pound (if paid in the said City of London), to the end and for the purpose of providing means and raising moneys to pay for property, including shares of the capital stock of other corporations, acquired and received and to be acquired and received by the Company, and to pay for labor done and to be done for the Company, and to pay the indebtedness incurred and to be incurred by the Company (including the payment or discharge of the outstanding First and Consolidated Mortgage, Series A. Six Per Cent., Sinking Fund, Twenty Year, Gold Bonds of the Company, and the payment or discharge of the outstanding bonds of other corporations, the payment of which said outstanding bonds of other corporations has been assumed by the Company), and for other legitimate and necessary purposes, the payment of the said bonded indebtedness proposed to be created to be secured by a mortgage or deed of trust upon and of all the property, real and personal, of every kind and nature whatsoever, owned by and belonging to the Company at the date of the said mortgage or deed of trust, and also upon and of all the property, real and personal, of every kind and nature whatsoever, thereafter in any manner acquired by the Company during the life or term of the said mortgage or deed of trust, was caused to be duly published by the said Secretary once a week for more than sixty (60) days before the said day appointed for the said meeting of the said stockholders, namely, for ten (10) successive weeks, commencing on the ——— day of ———, A. D. ———, up to and including the ——— day of ———, A. D. ———, in the regular issues of the said "San Francisco News Bureau," and a like notice was duly addressed, and mailed at the said United States Post Office, with the postage thereon fully prepaid, by the said Secretary, on the ——— day of ——— A. D. ———, being more than thirty (30) days before the said day appointed for the said meeting of the said stockholders, to each of the said stockholders whose names appeared on the books of the Company as sufficiently addressed, or identified, at his place of residence, if known, and if not known, then at the place, namely, the said City and County of San Francisco, in which the principal place of business of the Company is situate; and

Whereas, in pursuance of the said resolutions and the said notices, the said meeting of the said stockholders was duly held at the time and place specified in the said notices, namely, on the said ——— day of ———, A. D. 19—, at the hour of 10 o'clock A. M. of that day, at the said office of the Company, in Room No. ———, in the Pennsylvania Commercial Building, situated on ——— of ———and ——— Streets, in the said City and County of San Francisco, at which said meeting of the stockholders stockholders holding and representing on the books of the Com-

pany ——— shares, out of the total number of ——— shares of the subscribed and issued capital stock of the Company, being more than two-thirds of the subscribed and issued shares of the capital stock of the Company, were present in person or represented by proxies in writing; and

Whereas, at the said meeting of the said stockholders, resolutions were duly adopted by the unanimous vote of the said stockholders present in person or represented by proxies in writing, and by the unanimous vote of the subscribed and issued shares of the capital stock of the Company represented in person or by proxies in writing, wherein and whereby a bonded indebtedness of the Company in the said amount or principal sum of ———, with interest thereon at the rate of six (6) per cent. per annum, both principal and interest to be payable in gold coin of the United States of America, of or equal to the present standard of weight and fineness (if paid in the said City and County of San Francisco, or in the said City of New York), or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4.865) per pound (if paid in the said City of London), was authorized and created, for the purpose of providing means and raising moneys to pay for property, including shares of the capital stock of other corporations, acquired and received and to be acquired and received by the Company, and to pay for labor done and to be done for the Company, and to pay the indebtedness incurred and to be incurred by the Company (including the payment or discharge of the outstanding First and Consolidated Mortgage, Series A, Six Per Cent., Sinking Fund, Twenty Year, Gold Bonds of the Company, and the payment or discharge of the outstanding bonds of other corporations, the payment of which said outstanding bonds of other corporations has been assumed by the Company), and for other legitimate and necessary purposes; and wherein and whereby the Board of Directors of the Company were authorized, empowered and directed, for and in the name of the Company and as and for its corporate act, to cause to be made and executed by its proper officers, and to be certified and issued, the bonds (coupon and registered) of the Company evidenced and representing the said bonded indebtedness, to be designated and known as "A. B. Company, of California First Mortgage, Six Per Cent., Twenty Year, Gold Bonds," for an aggregate principal sum not to exceed ———, at any one time outstanding, the said coupon bonds to be in denominations of one thousand dollars ($1000) and five hundred dollars ($500), (and in the respective equivalents thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid), and in such

proportions of the said respective denominations as the said Board of Directors, from time to time, should determine, and to be dated as of the ——— day of ———, A. D. ———, and to bear interest at the rate of six (6) per cent. per annum from the said ——— day of ———, A. D. ———, the said interest to be payable semi-annually on the first days of July and January of each year thereafter, beginning on the ——— day of July, A. D. ———, and to be represented by appropriate interest coupons attached to the said coupon bonds, both principal and interest to be payable in gold coin of the United States of America, of or equal to the present standard of weight and fineness, at the office of the said C. D. Trust Company of San Francisco, in the said City and County of San Francisco, or at the office of United States Mortgage & Trust Company, in the said City of New York, or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, at the office of London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the respective holders of the said coupon bonds and interest coupons may elect, and the said coupon bonds to be payable on the first day of January, A. D. 1930, unless sooner redeemed, and the said coupon bonds and interest coupons to be otherwise in such form and to contain such provisions as should be determined by the said Board of Directors, and the said registered bonds to be in such denominations as should be determined by the said Board of Directors, and to be dated the respective dates when the same shall be issued, and to bear interest at the said rate of six (6) per cent. per annum from the first day of January or from the first day of July, as the case may be, next preceding the respective dates of such registered bonds, both principal and interest of the said registered bonds to be payable in gold coin aforesaid at the office of the said C. D. Trust Company of San Francisco, or at the office of the said United States Mortgage & Trust Company, in the said City of New York, or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, at the office of the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the respective holders of the said registered bonds may elect, and the said registered bonds to be payable on the said first day of January, A. D. 1930, unless sooner redeemed, and the said registered bonds to be otherwise in such form and to contain such provisions as should be determined by the said Board of Directors; and wherein and whereby the said Board of Directors, to secure the payment of the said bonds and the interest to become due thereon, were authorized, empowered and directed, in the name and on behalf of the Company, and as and for its corporate act, to cause to be made, exe-

cuted, acknowledged and delivered, by its proper officers, to the said C. D. Trust Company of San Francisco, as Trustee, a mortgage or deed of trust upon and of all the property, real and personal, of every kind and nature whatsoever, owned by and belonging to the Company at the date of the said mortgage or deed of trust, and also upon and of all the property, real and personal, of every kind and nature whatsoever, thereafter in any manner acquired by the Company during the life or term of the said mortgage or deed of trust, the said mortgage or deed of trust to be otherwise in such form and to contain such provisions as should be determined by the said Board of Directors; and wherein and whereby the said Board of Directors were authorized and empowered to sell or otherwise dispose of the said bonds at such times and upon such terms and for such prices or for such considerations as the said Board of Directors might deem expedient and for the best interests of the Company; and wherein and whereby the said Board of Directors were authorized, empowered and directed to do and perform all acts, deeds and things whatsoever (including the issuing of either interim certificates for the said bonds, or temporary bonds, until the said bonds shall have been engraved), which to the said Board of Directors should seem requisite, necessary or proper fully to carry out the objects and intent of the said resolutions of the said stockholders and fully to accomplish the purposes and objects for which the said bonded indebtedness was authorized and created; and

Whereas, thereafter, on the ——— day of ———, A. D. ———, a certificate under the corporate seal of the Company, and signed by the President and by the Secretary and by a majority of the Directors of the Company, and by the Chairman and by the Secretary of the said meeting of the said stockholders, and duly verified by the respective oaths of the said President and Secretary, showing a compliance with the requirements of subdivisions first, second, third and fourth, of Section 359 of the Civil Code of the said State of California and the amount of the bonded indebtedness created, the amount of stock represented at the said meeting of the said stockholders, and the total vote in the affirmative by which the same was accomplished and the total vote in the negative, and also the total number of the subscribed and issued shares of the capital stock of the Company, was duly filed in the office of the Clerk of the said City and County of San Francisco (the said City and County of San Francisco being the City and County where the original articles of incorporation of the Company were and are filed), and a certified copy of such certificate, duly certified by such Clerk, was thereafter filed, on the ——— day of ———, A. D. ——— in the office of the Secretary of

State of the said State of California, all as provided and required by the law; and

Whereas, thereafter, at a special meeting of the said Board of Directors, duly called, convened and held on the ——— day of ———, A. D. ———, at the said office of the Company, at which said last mentioned meeting of the said Board of Directors all the members thereof were present, the said Board of Directors, in the execution of the power, authority and direction so as aforesaid conferred and given, by the unanimous vote of all the members thereof, did resolve, order and direct that a bonded indebtedness of the Company in the said amount or principal sum of, ——— with interest thereon at the rate of six (6) per cent. per annum, both principal and interest to be payable in gold coin of the United States of America, of or equal to the present standard of weight and fineness (if paid in the said City and County of San Francisco, or in the said City of New York), or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4.865) per pound (if paid in the said City of London), be made and created, for the purpose of providing means and raising moneys to pay for property, including shares of the capital stock of other corporations, acquired and received and to be acquired and received and to be acquired and received by the Company, and to pay for labor done and to be done for the Company, and to pay the indebtedness incurred and to be incurred by the Company (including the payment or discharge of the outstanding First and Consolidated Mortgage, Series A, Six Per Cent., Sinking Fund, Twenty Year, Gold Bonds, of the Company, and the payment or discharge of the outstanding bonds of other corporations, the payment of which said outstanding bonds of other corporations has been assumed by the Company), and for other legitimate and necessary purposes; and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that bonds (coupon and registered) of the Company, evidencing and representing the said bonded indebtedness, be made, executed, certified and issued; that the said bonds be designated and known as A. B. Company of California First Mortgage, Six Per Cent, Twenty Year, Gold Bonds"; that the said coupon bonds be in denominations of one thousand dollars ($1000) and five hundred dollars ($500), (and in the respective equivalents thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid); that the said coupon bonds of the denomination of one thousand dollars ($1000), (and the equivalent thereof

in sterling money of Great Britain, at the fixed rate of exchange aforesaid), be numbered consecutively from M1 upwards, and the said coupon bonds of the denomination of five hundred dollars ($500), (and the equivalent thereof in sterling money of Great Gritain, at the fixed rate of exchange aforesaid), be numbered consecutively from D1 upwards, and be made, executed, certified and issued in such proportions of the said respective denominations as the said Board of Directors, from time to time, shall determine; that the said coupon bonds be dated as of the said first day of January, A. D. 1910; that the principal of the said coupon bonds be payable on the said first day of January, A. D. 1930, unless sooner redeemed, in gold coin of the United States of America, of or equal to the present standard of weight and fineness, at the office of the said C. D. Trust Company of San Francisco, in the said City and County of San Francisco, or at the office of the said United States Mortgage & Trust Company, in the said City of New York, or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, at the office of the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the respective holders of the said coupon bonds may elect; that the said coupon bands bear interest at the rate of six (6) per cent. per annum from the said first day of January, A. D. ———, until payment or redemption thereof, payable semiannually on the first day of each succeeding July and January, beginning on the said first day of July, A. D. ——— in gold coin aforesaid, at the office of the said C. D. Trust Company of San Francisco, in the said City and County of San Francisco, or at the office of the said United States Mortgage & Trust Company, in the said City of New York, or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, at the office of the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the respective holders of the said interest coupons may elect; that the said coupon bonds be exchangeable by the respective holders thereof for registered bonds, as provided in the said mortgage or deed of trust; that the said registered bonds be in denominations of one thousand dollars ($1000), five thousand dollars ($5000), ten thousand dollars ($10,000) and fifty thousand dollars ($50,000), (and in the respective equivalents thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid); that the said registered bonds be respectively numbered consecutively from I1, V1, X1 and L1, upwards; that the principal of the said registered bonds be payable on the said first day of January, A. D. 1930, unless sooner redeemed, in gold coin aforesaid, at the office of the said C. D. Trust Company of San Francisco, in the said City and County of San Francisco, or at the

office of the said United States Mortgage & Trust Company, in the said City of New York, or in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, at the office of the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the respective holders of the said registered bonds may elect; that the said registered bonds be dated the respective dates when the same shall be certified and bear interest at the said rate of (6) per cent. per annum from the first day of January or from the first day of July, as the case may be, next preceding the respective dates of such registered bonds, until payment or redemption thereof, payable semi-annually, on the first day of each succeeding July or January, as the case may be; that the said registered bonds be exchangeable by the respective holders thereof for coupon bonds, as provided in the said mortgage or deed of trust; that all or any number of the said bonds (coupon and registered) be subject to redemption, at the option of the Company, prior to the maturity thereof, on the date of payment of any semi-annual installment of interest, upon the payment of the principal thereof and all interest due thereon at the date of such redemption, together with a premium of ten (10) per cent. of the principal thereof, as provided in the said mortgage or deed of trust; and that the corporate name of the Company be subscribed and the corporate seal of the Company be affixed to each of the said bonds, and that each of the said bonds be signed by the President or one of the Vice-Presidents, and by the Secretary or the Assistant Secretary, of the Company; and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that the said coupon bonds, of the denomination of one thousand dollars ($1000), (and the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid), be in the form, or in substantially the form, following:

UNITED STATES OF AMERICA

$1000	STATE OF CALIFORNIA	£205.11
U. S. Gold		Sterling
No. M....	(Vignette)	No. M....

A. B. COMPANY OF CALIFORNIA

FIRST MORTGAGE, SIX PER CENT., TWENTY YEAR GOLD BOND.

A. B. Company of California, a corporation incorporated, organized and existing under the laws of the State of California, United States of America (hereinafter called the "Company"), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, on the first day of January, A. D. 1930 (unless before that date this bond shall have been re-

deemed), the sum of ONE THOUSAND DOLLARS ($1000), in gold coin of the United States of America, of or equal to the present standard of weight and fineness, at the office of C. D. Trust Company of San Francisco (hereinafter called the "Trustee"), in the City and County of San Francisco, State of California, United States of America, or at the office of United States Mortgage & Trust Company, in the City of New York, State of New York, United States of America, or the sum of TWO HUNDRED AND FIVE POUNDS and ELEVEN SHILLINGS (£205.11), in sterling money of Great Britain, at the office of London County and Westminster Bank, Limited, 41 Lothbury, in the City of London, England, as the holder of this bond may elect, and to pay interest thereon from the first day of January, A. D. 1910, until payment or redemption of this bond, at the rate of six (6) per cent. per annum, payable semi-annually on the first day of each succeeding July and January, beginning on the first day of July, A. D. 1910, in gold coin aforesaid, at the said office of the Trustee, in the said City and County of San Francisco, or at the said office of the said United States Mortgage & Trust Company, in the said City of New York, or in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4.865) per pound, at the said office of the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the holders of the respective interest coupons attached to this bond may elect. Prior to the maturity of this bond, the said interest shall be payable only in accordance with, and upon the presentation and surrender of, the interest coupons attached to this bond as they severally mature.

The Company hereby agrees that both the principal and the interest of this bond shall be paid without deduction for any tax or taxes which the Company may be required or permitted to pay thereon, or to retain therefrom, under any present or future law of the United States of America, or of any State, County, Municipality, or other governmental subdivision therein.

This bond is one of a series of bonds (coupon and registered), designated and known as "A. B. Company of California First Mortgage, Six Per Cent., Twenty Year, Gold Bonds," duly authorized by the stockholders and by the Board of Directors of the Company, in the manner and form prescribed by law, issued and to be issued by the Company in an amount not exceeding in the aggregate the principal sum of fifteen million dollars ($15,000,000), at any one time outstanding. All of the said bonds are issued and to be issued under, and in pursuance of, and are equally secured, without preference, priority or distinction of any bond over any other of the said bonds by, a mortgage or deed of trust dated as of the ——— day of ———, A. D. ———, executed by

the Company to the Trustee, reference to which said mortgage or deed of trust is hereby made for a statement of the nature and extent of the security, the rights of the holders of the said bonds, and the terms and conditions upon which the said bonds are issued and to be issued. All rights of action, as well as all other rights of the holders of the said bonds, are subject to the provisions of the said mortgage or deed of trust.

If default shall be made in the payment of any semiannual installment of interest on any of the said bonds, and if such default shall continue for the period of two (2) months, the principal thereof may become due and payable, as provided in the said mortgage or deed of trust.

A sinking fund, to be applied to the payment or redemption of the said bonds, is provided in the said mortgage or deed of trust.

This bond is subject to be redeemed, at the option of the Company, prior to the maturity thereof, on the date of payment of any semi-annual installment of interest, upon the payment of the principal hereof and all interest due hereon at the date of such redemption, together with a premium of ten (10) per cent. of the principal hereof, as provided in the said mortgage or deed of trust.

This bond shall be transferable by delivery, unless registered in the name of the holder thereof on the books kept by the Trustee, or by a co-trustee or co-trustees, for the purpose of registration, such registration being noted hereon, as provided in the said mortgage or deed of trust. After such registration no transfer of this bond shall be valid unless made on the said books by the registered holder, or by his duly authorized attorney, and similarly noted hereon. Such transfer on the said books may be made to bearer, and if so made to bearer the transferability of this bond by delivery shall thereby be restored; but registry of this bond may be made again, from time to time, in the name of the then holder, or transferability thereof by delivery may be restored, as before. The interest coupons of this bond shall be transferable by delivery, notwithstanding such registration, unless the holder of this bond shall surrender the same, with all unmatured interest coupons thereto appertaining, to the Trustee, or to a co-trustee or co-trustees, for cancellation, in exchange for a registered bond without coupons, as provided in the said mortgage or deed of trust, and on payment, if required, of the transfer charges therein provided for.

This bond shall not be valid or obligatory for any purpose until the certificate endorsed hereon shall have been duly signed by the Trustee.

No recourse to or upon any liability, whether constitutional, statutory or otherwise, shall be had, either directly or indirectly, against any stockholder, director or other officer of the Company, for the payment of the principal or the interest hereof, or for any claim based thereon or in respect thereof, or on or in respect of any provision of the said mortgage or deed of trust.

In Witness Whereof, the said A. B. Company of California has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed, and this bond to be signed by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, thereunto duly authorized, and the interest coupons hereto attached to be authenticated by the *fac simile* signature of its Treasurer engraved thereon, as of the first day of January, A. D. 1910.

A. B. COMPANY OF CALIFORNIA,

By

....,

Secretary. President;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that to each of the said coupon bonds, of the denomination of one thousand dollars ($1000), (and the equivalent thereof in sterling money of Great Britain at the fixed rate of exchange aforesaid), there be attached forty (40) interest coupons, numbered consecutively from one (1) to forty (40), both numbers inclusive, and also bearing the serial number of the bond to which they are attached, with the *fac simile* signature of the Treasurer of the Company engraved thereon; that each of the said forty (40) coupons represent the interest on the bond to which the same is attached, at the rate of six (6) per cent. per annum for the period of six (6) months, and the date when such coupons shall be payable be so inserted therein as to make such coupons fall due successively at the end of every period of six (6) months after the said first day of January, A. D. 1910, the first such coupon to be payable on the first day of July, A. D. 1910; and that such coupons be in the form, or in substantially the form, following:

(Vignette) $30.
£6.3.4

On the first day of ——— A. D. 19—, A. B. Company of California will pay to the bearer hereof the sum of THIRTY DOLLARS ($30), in gold coin of the United States of America, of or

equal to the present standard of weight and fineness, at the office of C. D. Trust Company of San Francisco, in the City and County of San Francisco, State of California, United States of America, or at the office of the United States Mortgage & Trust Company, in the City of New York, State of New York, United States of America, or the sum of SIX POUNDS, THREE SHILLINGS and FOUR PENCE (£6.3.4), in sterling money of Great Britain, at the office of LONDON COUNTY AND WESTMINSTER BANK, LIMITED, 41 Lothbury, in the City of London, England, as the bearer hereof may elect, being six (6) months' interest on the First Mortgage, Six Per Cent., Twenty Year, Gold Bond, No———, of the said A. B. Company of California, subject to the previous redemption of the said bond. Coupon No. ———

No. ....,

Treasurer;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that the said coupon bonds, of the denomination of five hundred dollars ($500), (and the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid), be in the form, or in substantially the form, following:

UNITED STATES OF AMERICA

$500 STATE OF CALIFORNIA £102.15.6

U. S. Gold Sterling

No. D..... (Vignette) No. D.....

A. B. COMPANY OF CALIFORNIA

FIRST MORTGAGE, SIX PER CENT., TWENTY YEAR, GOLD BOND.

A. B. Company of California, a corporation incorporated, organized and existing under the laws of the State of California, United States of America (hereinafter called the "Company"), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, on the ——— day of ———, A. D. ——— (unless before that date this bond shall have been redeemed), the sum of FIVE HUNDRED DOLLARS ($500), in gold coin of the United States of America, of or equal to the present standard of weight and fineness, at the office of C. D. TRUST COMPANY OF SAN FRANCISCO (hereinafter called the "Trustee"), in the City and County of San Francisco, State of State of New York, United States of America, or the sum of ONE HUNDRED AND TWO POUNDS, FIFTEEN SHILLINGS and SIX PENCE (£102.15.6), in sterling money of Great Britain, at the office of LONDON COUNTY AND WESTMINSTER BANK, LIMITED, 41 Lothbury,

in the City of London, England, as the holder of this bond may elect, and to pay interest thereon from the first day of January, A. D. 1910, until payment or redemption of this bond, at the rate of six (6) per cent. per annum, payable semi-annually, on the first day of each succeeding July and January, beginning on the first day of July, A. D. 1910, in gold coin aforesaid, at the said office of the Trustee, in the said City and County of San Francisco, or at the said office of the said UNITED STATES MORTGAGE & TRUST COMPANY, in the said City of New York, or in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4.865) per pound, at the said office of the said LONDON COUNTY AND WESTMINSTER BANK, LIMITED, 41 Lothbury, in the said City of London, as the holders of the respective interest coupons attached to this bond may elect. Prior to the maturity of this bond, the said interest shall be payable only in accordance with, and upon the presentation and surrender of, the interest coupons attached to this bond as they severally mature.

The Company hereby agrees that both the principal and the interest of this bond shall be paid without deduction for any tax or taxes which the Company may be required or permitted to pay thereon, or to retain therefrom, under any present or future law of the United States of America, or of any State, County, Municipality, or other governmental subdivision therein.

This bond is one of a series of bonds (coupon and registered), designated and known as "A. B. Company of California First Mortgage, Six Per Cent., Twenty Year, Gold Bonds," duly authorized by the stockholders and by the Board of Directors of the Company, in the manner and form rescribed by law, issued and to be issued by the Company in an amount not exceeding in the aggregate the principal sum of fifteen million dollars ($15,000,000), at any one time outstanding. All of the said bonds are issued and to be issued under, and in pursuance of, and are equally secured, without preference, priority or distinction of any bond over any other of the said bonds by, a mortgage or deed of trust dated as of the first day of January, A. D. 1910, executed by the Company to the Trustee, reference to which said mortgage or deed of trust is hereby made for a statement of the nature and extent of the security, the rights of the holders of the said bonds and the terms and conditions upon which the said bonds are issued and to be issued. All rights of action, as well as all other rights of the holders of the said bonds, are subject to the provisions of the said mortgage or deed of trust.

If default shall be made in the payment of any semi-annual in-

stallment of interest on any of the said bonds, and if such default shall continue for the period of two (2) months, the principal thereof may become due and payable, as provided in the said mortgage or deed of trust.

A sinking fund, to be applied to the payment or redemption of the said bonds, is provided in the said mortgage or deed of trust.

This bond is subject to be redeemed, at the option of the Company, prior to the maturity thereof, on the date of payment of any semi-annual installment of interest, upon the payment of the principal hereof and all interest due hereon at the date of such redemption, together with a premium of ten (10) per cent. of the principal hereof, as provided in the said mortgage or deed of trust.

This bond shall be transferable by delivery, unless registered in the name of the holder thereof on the books kept by the Trustee, or by a co-trustee or co-trustees, for the purpose of registration, such registration being noted hereon, as provided in the said mortgage or deed of trust. After such registration, no transfer of this bond shall be valid unless made on the said books by the registered holder, or by his duly authorized attorney, and similarly noted hereon. Such transfer on the said books may be made to bearer, and if so made to bearer the transferability of this bond by delivery shall thereby be restored; but registry of this bond may be made again, from time to time, in the name of the then holder, or transferability thereof by delivery may be restored, as before The interest coupons of this bond shall be transferable by delivery, notwithstanding such registration, unless the holder of this bond shall surrender the same, with all unmatured interest coupons thereto appertaining, to the Trustee, or to a co-trustee or co-trustees, for cancellation, in exchange for a registered bond without coupons, as provided in the said mortgage or deed of trust, and on payment, if required, of the transfer charges therein provided for.

This bond shall not be valid or obligatory for any purpose until the certificate endorsed hereon shall have been duly signed by the Trustee.

No recourse to or upon any liability, whether constitutional, statutory or otherwise, shall be had, either directly or indirectly, against any stockholder, director or other officer of the Company, for the payment of the principal or the interest hereof, or for any claim based thereon or in respect thereof, or on or in respect of any provision of the said mortgage or deed of trust.

In Witness Whereof, the said A. B. Company of California has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed, and this bond to be signed by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, thereunto duly authorized, and the interest coupons hereto attached to be authenticated by the *fac simile* signature of its Treasurer engraved thereon, as of the first day of January, A. D. 19—.

A. B. COMPANY OF CALIFORNIA,

By

....,

Secretary. President;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that to each of the said coupon bonds, of the denomination of five hundred dollars ($500), (and the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid), there be attached forty (40) interest coupons, numbered consecutively from one (1) to forty (40), both numbers inclusive, and also bearing the serial number of the bond to which they are attached, with the *fac simile* signature of the Treasurer of the Company engraved thereon; that each of the said forty (40) coupons represent the interest on the bonds to which the same is attached, at the rate of six (6) per cent. per annum, for the period of six (6) months, and dates when such coupons shall be payable be so inserted therein as to make such coupons fall due successively at the end of every period of six (6) months after the said first day of January, A. D. 1910, the first such coupon to be payable on the first day of July, A. D. 1910; and that such coupons be in the form, or in substantially the form, following:

(Vignette) $15.
£3.1.8

On the first day of ———, A. D. 19—, A. B. Company of California will pay to the bearer hereof the sum of FIFTEEN DOLLARS ($15), in gold coin of the United States of America, of or equal to the present standard of weight and fineness, at the office of C. D. TRUST COMPANY OF SAN FRANCISCO, in the City and County of San Francisco, State of California, United States of America, or at the office of UNITED STATES MORTGAGE & TRUST COMPANY, in the City of New York, State of New York, United States of America, or the sum of THREE POUNDS, ONE SHILLING and EIGHT PENCE (£3.1.8), in sterling money of Great Britain, at the office of LONDON COUNTY AND WESTMINSTER

BANK, LIMITED, 41 Lothbury, in the City of London, England, as the bearer hereof may elect, being six (6) months' interest on .....,
the First Mortgage, Six Per Cent., Twenty Year, Gold Bond, No. ———, of the said A. B. COMPANY OF CALIFORNIA, subject to the previous redemption of the said bond. Coupon No. ———.

Treasurer;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that on each of the said coupon bonds there be endorsed, for the purpose of authenticating the same, a certificate, to be executed by the said C. D. Trust Company of San Francisco, as Trustee, by its Secretary, or by its successor or successors in the trusts created under the said mortgage or deed of trust, by its or their Secretary; and that such certificate to be in the form, or in substantially the form, following:

TRUSTEE'S CERTIFICATE.

It is hereby certified that the within bond is one of the series of bonds described in the mortgage or deed of trust therein mentioned.

C. D. TRUST COMPANY OF SAN FRANCISCO,

Trustee,

By .....,

Secretary:

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that each of the said coupon bonds should have endorsed thereon, for the registration thereof, the form, or substantially the form, following:

Notice: No writing on this bond, except by an officer of the Company.

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order

and direct that the said registered bonds be in the form, or in substantially the form following:

UNITED STATES OF AMERICA
STATE OF CALIFORNIA

$..... (Vignette) £.....
U. S. Gold Sterling
No. ..... No. .....

A. B. COMPANY OF CALIFORNIA

FIRST MORTGAGE, SIX PER CENT., TWENTY YEAR, GOLD BOND.

A. B. COMPANY OF CALIFORNIA, a corporation incorporated, organized and existing under the laws of the State of California, United States of America (hereinafter called the "Company"), for value received, hereby promises to pay to ...., or registered asisgns, on the first day of January, A. D. 1930 (unless before that date this bond shall have been redeemed), the sum of ..... DOLLARS, (..... .....), in gold coin of the United States of America, of or equal to the present standard of weight and fineness, at the office of C. D. TRUST COMPANY OF SAN FRANCISCO (hereinafter called the "Trustee"), in the City and County of San Francisco, State of California, United States of America, or at the office of UNITED STATES MORTGAGE & TRUST COMPANY, in the City of New York, State of New York, United States of America, or the sum of .... (£.....), in sterling money of Great Britain, at the office of LONDON COUNTY AND WESTMINSTER BANK LIMITED, 41 Lothbury, in the City of London, England, as the holder of this bond may elect, and to pay interest thereon from the first day of January or from the first day of July, as the case may be, next preceding the date of this bond, until payment or redemption of this bond, at the rate of six (6) per cent. per annum, payable semi-annually, on the first day of each succeeding July and January after the date of this bond, in gold coin aforesaid, at the said office of the Trustee, in the said City and County of San Francisco, or at the said office of the said UNITED STATES MORTGAGE & TRUST COMPANY, in the said City of New York, or in sterling money of Great Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4.865) per pound, at the said office of the said LONDON COUNTY AND WESTMINSTER BANK, LIMITED, 41 Lothbury, in the said City of London, as the registered holder of this bond may elect.

The Company hereby agrees that both the principal and the interest of this bond shall be paid without deduction for any tax or

taxes which the Company may be required or permitted to pay thereon, or to retain therefrom, under any present or future law of the United States of America, or of any State, County, Municipality, or other governmental subdivision therein.

This bond is one of a series of bonds (coupon and registered) designated and known as "A. B. Company of California First Mortgage, Six Per Cent., Twenty Year, Gold Bonds," duly authorized by the stockholders and by the Board of Directors of the Company, in the manner and form prescribed by law, issued and to be issued by the Company in an amount not exceeding in the aggregate the principal sum of fifteen million dollars $15,000,000), at any one time outstanding. All of the said bonds are issued and to be issued under, and in pursuance of, and are equally secured, without preference, priority or distinction of any bond over any other of the said bonds by, a mortgage or deed of trust dated as of the first day of January, A. D. 1910, executed by the Company to the Trustee, reference to which said mortgage or deed of trust is hereby made for a statement of the nature and extent of the security, the rights of the holders of the said bonds and the terms and conditions upon which the said bonds are issued and to be issued. All rights of action, as well as all other rights of the holders of the said bonds, are subject to the provisions of the said mortgage or deed of trust.

If default shall be made in the payment of any semi-annual installment of interest on any of the said bonds, and if such default shall continue for the period of two (2) months, the principal thereof may become due and payable, as provided in the said mortgage or deed of trust.

A sinking fund, to be applied to the payment or redemption of the said bonds, is provided in the said mortgage or deed of trust.

This bond is subject to be redeemed, at the option of the Company, prior to the maturity thereof, on the date of payment of any semi-annual installment of interest, upon the payment of the principal hereof and all interest due hereon at the date of such redemption, together with a premium of ten (10) per cent. of the principal hereof, as provided in the said mortgage or deed of trust.

This bond is issued in lieu of, or in exchange for, the coupon bonds the numbers of which are endorsed hereon; and the coupon bonds so numbered are not issued or outstanding contemporaneously herewith. This bond is transferable by the registered

holder hereof, or by his duly authorized attorney, on the books kept by the Trustee, or by a co-trustee or co-trustees, for the purpose of registration, on surrender and cancellation of this bond, and, thereupon, a new registered bond, or bonds, without coupons, having endorsed thereon the same serial numbers as are endorsed hereon, will be issued to the transferee of this bond in exchange therefor, or the registered holder of this bond, at his option, may surrender the same for cancellation in exchange for a like amount of the principal hereof in coupon bonds, bearing the serial numbers endorsed hereon, with coupons attached maturing on and after the next ensuing interest due day, as provided in the said mortgage or deed of trust, and on payment in either case, if required, of the transfer charges therein provided for.

This bond shall not be valid or obligatory for any purpose until the certificate endorsed hereon shall have been duly signed by the Trustee, or by a co-trustee or co-trustees, as provided in the said mortgage or deed of trust.

No recourse to or upon any liability, whether constitutional, statutory or otherwise, shall be had, either directly or indirectly, against any stockholder, director or other officer of the Company, for the payment of the principal or the interest hereof, or for any claim based thereon or in respect thereof, or on or in respect of any provision of the said mortgage or deed of trust.

In Witness Whereof, the said A. B. Company of California has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed, and this bond to be signed by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, thereunto duly authorized, this ——— day of ———, A. D. 19—.

A. B. COMPANY OF CALIFORNIA,

By

....., ...

Secretary, President;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that, at the time when any of the said registered bonds shall be certified, the respective blanks therein shall be filled in with the appropriate number as aforesaid, the appropriate denomination in dollars, and in the squivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, the name of the registered holder, the appropriate principal sum

payable in dollars, and in the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, and the date of such bond; and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that on each of the said registered bonds there be endorsed, for the purpose of authenticating the same, a certificate to be executed by the said C. D. Trust Company of San Francisco, as Trustee, by its Secretary, or by its successor or successors in the trusts created under the said mortgage or deed of trust, by its or their Secretary, or by a co-trustee or co-trustees, by its or their Secretary, as hereinafter provided; and that such certificate be in the form, or in substantially the form, following:

TRUSTEE'S CERTIFICATE.

It is hereby certified that the within bond is one of the series of bonds described in the mortgage or deed of trust therein mentioned.

....., Trustee,

By ....., Secretary;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that each of the said registered bonds should have endorsed thereon, for the assignment and transfer thereof, the following, or substantially the following:

For value received,

hereby sell, assign and transfer unto .....
....,
of ....,
the within bond issued by A. B. Company of California, and hereby irrevocably authorize the Trustee, its successor or successors, or a co-trustee or co-trustees, to transfer said bond on its or their books kept for that purpose.

Dated .....,

Witness: .....
.....;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that each of the said registered bonds should also have endorsed thereon, for the registration thereof, the following, or substantially the following:

Exchangeable for Coupon Bonds.—The within bond is issued in lieu of, or in exchange for, Coupon Bonds, numbered M..... ..... for One Thousand Dollars ($1000) each, and Coupon Bonds, numbered D ...., for Five Hundred Dollars ($500) each, none of which bonds is contemporaneously outstanding, and a new Registered Bond or Coupon Bonds bearing the above said serial numbers will be issued in exchange for this Bond upon its surrender and cancellation;

and

Whereas, the said Board of Directors, at the meeting thereof last aforesaid, and by the vote aforesaid, did further resolve, order and direct that in order to secure the payment, as hereinafter provided, of the principal and the interest of the said bonds, as the same became due, this mortgage or deed of trust upon and of all the property, real and personal, of every kind and nature whatsoever owned by and belonging to the Company at the date of this said mortgage or deed of trust, and also upon and of all the property, real and personal of, every kind and nature whatsoever, thereafter in any manner acquired by the Company during the life or term of this said mortgage or deed or trust, be made, executed and acknowledged by the President and the Secretary of the Company, for and in the name and on behalf and under the corporate seal of the Company, and be delievered by the President and the Secretary of the Company, as and for the corporate act and deed of the Company, to the said C. D. Trust Company of San Francisco, as Trustee, in the form and upon the terms and conditions herein expressed;

and

Whereas, the said meeting of the said stockholders held as aforesaid on the said ——— day of ——— A. D. 19— was duly adjourned by the said stockholders, after the adoption of their said resolutions authorizing and creating the said bonded indebtedness, to the said ——— day of ——— A. D. 19—, at an hour subsequent to the meeting last aforesaid of the said Board of Directors, at which said adjourned meeting stockholders holding and represent-

ing on the books of the Company ..... shares out of the said total number of .... shares of the subscribed and issued capital stock of the Company, being more than two-thirds of the subscribed and issued shares of the capital stock of the Company, were present in person or represented by proxies in writing, and at which said adjourned meeting of the said stockholders a resolution was duly adopted by the unanimous vote of the said stockholders present in person or represented by proxies in writing, and by the unanimous vote of the subscribed and issued shares of the capital stock of the Company represented in person or by proxies in writing, wherein and whereby all the acts and resolutions herein mentioned of the said Board of Directors and of the said stockholders, including the forms of the said bonds (coupon and registered), interest coupons, trustee's certificates and endorsements on the said bonds, and this mortgage or deed of trust were approved and confirmed;

Now Therefore, the Company, the party of the first part, for the purpose of securing the payment, as hereinafter provided, of the principal and interest of the said bonds, as the same become due, and in consideration of the sum of five dollars ($5), gold coin of the United States of America, paid to the Company by the Trustee, the party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, conveyed, aliened, transferred, assigned, pledged, hypothecated, released and confirmed, and by these presents does grant, bargain, sell, convey, alien, transfer, assign, pledge, hypothecate, release and confirm unto the Trustee, and to its successor or successors in the trusts hereby created, its and their successors, forever, all and singular the right, title and interest of the Company in and to the property, real and personal, described as follows:

All those certain lots, pieces or parcels of land situate, lying and being in the County of ———, State of ———, particularly described as follows: (*Description of land.*)

Excepting, however, the said right of way heretofore granted by the said Robinson Estate Company, or by the executors of the estate of Charles Crocker, deceased and F. G. Smith to C. D. Jackson, et al., or to the said Feather River Canal Company, to construct a canal through the land described in this paragraph "Tenth"; reference to which said grants of rights of way is hereby referred to for further particulars; and also excepting any rights of way which the public may lawfully claim to have been dedicated as rights of way for public use; provided, however, that each and

every reversion, reversionary right or right of forfeiture, by reason of the abandonment or relinquishment of any of the rights of way in this paragraph referred to, or by reason of the breach of any of the covenants under which a forfeiture might be declared to have arisen under the terms of the grants in this paragraph referred to, are hereby expressly conveyed and transferred in trust.

All property, real and personal, generally described as follows:

First: All shops, mills and all other buildings and structures, all dredges, rock crushers, engines, cars, motors, transformers, pumps and all other machinery, apparatus, appliances, implements, tools and equipments, and all other property, real and personal, used or acquired for the use of the Company in the mining, rock crushing and quarrying business of the Company, whether owned by and belonging to the Company at the date of this mortgage or deed of trust or thereafter in any manner acquired by the Company during the life or term of this mortgage or deed of trust.

Second: All buildings and structures, and all dredges, cars, motors, transformers, pumps and all other machinery, apparatus, appliances, implements, tools and equipments, and all other property, real and personal, used or acquired for the use of the Company, in reclaiming lands, wheresoever the same may be situated, whether owned by or belonging to the Company at the date of this mortgage or deed of trust or thereafter in any manner acquired by the Company during the life or term of this mortgage or deed of trust.

Third: All water and water rights, and all plants, systems, works, dams, dam sites, reservoirs, reservoir sites, aqueducts, canals, ditches, flumes, mains, pipes, conduits, and all other structures, machinery, apparatus, appliances, implements, tools and equipments, and all other property, real and personal, including rights of way, privileges and franchises, used or intended to be used, in producing, appropriating, diverting, storing, distributing, delivering, supplying and selling water, whether owned by and belonging to the Company at the date of this mortgage or deed of trust or thereafter in any manner acquired by the Company during the life or term of this mortgage or deed of trust.

Fourth: All plants, systems, works, power houses, transformer houses, stations, towers, poles, lines, cables, wires, engines, boilers, dynamos, converters, transformers and all other structures, machinery, apparatus, appliances, implements, tools

and equipments, and all other property, real and personal, including rights of way, privileges and franchises, used or acquired for the use of the Company, in manufacturing, generating, producing, distributing, delivering and supplying electricity and electric current, whether owned by and belonging to the Company at the date of this mortgage or deed of trust or thereafter in any manner acquired by the Company during the life or terms of this mortgage or deed of trust.

Fifth: All stocks, bonds, debentures and all other securities of other corporations, whether owned by and belonging to the Company at the date of this mortgage or deed of trust or thereafter in any manner acquired by the Company during the life or term of this mortgage or deed of trust.

Sixth: All other property, real and personal, of every kind and nature whatsoever, and wheresoever the same may be situated, whether owned by and belonging to the Company at the date of this mortgage or deed of trust or thereafter in any manner acquired by the Company during the life or term of this mortgage or deed of trust.

Together with all and singular the tenements, hereditaments and appurtenances unto each and all of the said property belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, revenues, rents, issues, incomes, earnings and profits thereof.

To Have and to Hold all and singular the said property, unto the Trustee and its successor or successors in the trusts hereby created, forever, but in trust, nevertheless, for the purpose of securing the payment of the principal and the interest of the said bonds issued hereunder, equally, without any preference, priority or distinction of any of the said bonds over any other of the said bonds, by reason of the priority in the time of execution, certification, delivery or issuance thereof, or otherwise, and for the purpose of securing the performance of the covenants and agreements herein contained, on the part of the Company to be kept and performed, in accordance with the terms and provisions of the said bonds and of this mortgage or deed of trust, so that each and every bond issued hereunder shall have the same right, benefit, lien and security under and by virtue hereof, and the principal and the interest of each and every bond shall be equally and proportionally secured hereby, in the same manner and to the same extent as if all of the said bonds had been executed, certified, delivered and issued simultaneously with the execution and delivery

of this mortgage or deed of trust; it being intended that the lien and security of this mortgage or deed of trust shall take effect from the date thereof, without regard to the actual execution, certification, delivery or issuance of the said bonds, as though upon such date all of the said bonds were actually executed, certified, delivered and issued.

Provided, However, and these presents are upon the express condition, that if the Company shall well and truly pay, or cause to be paid, the principal and the interest of the said bonds issued hereunder, when and as the same shall become due and payable, in accordance with the terms and provisions of the said bonds and of this mortgage or deed of trust, or shall make provision for such payment, in accordance with the terms and provisions hereof, and shall well and truly pay all other moneys payable hereunder, when and as the same shall become due and payable, and shall well and truly keep and perform all covenants and agreements required by these presents by it to be kept and performed, then these presents and the estate hereby granted shall thereupon cease and determine and be null and void, and the Trustee, its successors in the trusts hereby created, on demand of the Company, its successors or assigns, and at its or their cost, shall make, execute, acknowledge and deliver to the Company, its successors or assigns, a satisfaction and discharge of this mortgage or deed of trust, and a reconveyance of the property hereby conveyed, assigned and transferred, and shall deliver to the Compny, its successors or assigns, all moneys and other property held hereunder by the Trustee, its successor or successor in the trusts hereby created.

And Provided Also, and these presents are upon the further express condition, that until default shall be made in the payment of the principal or the interest of the said bonds issued hereunder, or in the performance of any of the covenants or agreements herein contained, on the part of the Company to be kept and performed, the Company, except as hereinafter otherwise provided, shall be entitled to possess, use, enjoy, control, manage and operate all of the said property, and shall have the right to take, use and dispose of the revenues, rents, issues, incomes, earnings and profits thereof, in the same manner and to the same extent as if this mortgage or deed of trust had not been made, and this indenture further witnesseth:

That the further terms and conditions upon which the said bonds issued hereunder shall be certified, delivered and issued, and the trusts upon which the Trustee, its successor or successors in the trusts hereby created, shall hold the said property hereby

conveyed, assigned and transferred, and the powers which the Trustee, its successor or successors in the trusts hereby created, shall be authorized to exercise in respect to the said property, and the covenants and agreements on the part of the Company to be kept and performed, are as follows:

ARTICLE ONE.

Execution, Certification and Registration of Bonds.

Section One. The bonds (coupon and registered) issued hereunder, and the interest coupons appertaining to the said coupon bonds, shall respectively be in the form, tenor and effect, or in substantially the form, tenor and effect, as hereinabove set forth

Section Two. The bonds (coupon and registered) issued hereunder shall be executed in the name and under the corporate seal of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, in the manner hereinabove provided. The said coupon bonds, when so executed, shall be delivered to the Trustee, its successor or successors in the trusts hereby created, for certification, and thereupon the Trustee, its successor or successors in trusts hereby created, shall certify the same in the form, or in substantially the form, hereinabove provided therefor, and shall deliver the same as hereinafter provided. The said registered bonds, when so executed, shall be delivered to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, as hereinafter provided, for certification, and thereupon the Trustee, its successor or successors in the trusts hereby created, or a co-trustee or co-trustees, as the case may be, shall certify the same in the form, or in substantially the form, hereinabove provided therefor, and shall deliver the same as hereinafter provided.

Section Three. Every coupon bond issued hereunder shall be certified prior thereto by the Trustee, its successor or successors in the trusts hereby created, and every registered bond issued hereunder shall be certified prior thereto by the Trustee, its successor or successors in the trusts hereby created, or by a co-trustee or co-trustees, in the form, or in substantially the form, hereinabove respectively provided therefor, and no bond shall be valid or obligatory for any purpose hereunder, or entitled to the security afforded hereby, unless and until the same shall be so certified; and such certificate shall be conclusive evidence that the bond so certified has been duly issued hereunder and that the same is secured hereby.

Section Four. Any of the said bonds to be issued hereunder may be originally executed, certified, delivered and issued either as coupon bonds or as registered bonds, at the option of the Company; provided, however, that no registered bond of a less denomination than one thousand dollars ($1,000), or the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, shall be executed, certified or issued.

Section Five. The coupon bonds of the said respective denominations issued hereunder shall be certified and delivered in the order of their respective serial numbers stamped thereon. The registered bonds of the said respective denominations issued hereunder shall be likewise certified and delivered in the order of their respctive serial numbers stamped thereon.

Section Six. Before certifying and delivering any coupon bond issued hereunder, the Trustee, its successor or successors in the trusts hereby created, shall remove and cancel all interest coupons thereto attached which shall then be matured, and when so canceled the said interest coupons shall be delivered by the Trustee, its successor or successors in the trusts hereby created, to the Company.

Section Seven. The bonds (coupon and registered) issued hereunder may be signed and sealed, in the manner hereinabove provided, by the present President or one of the present Vice Presidents of the Company, and by the present Secretary or the present Assistant Secretary of the Company, notwithstanding such officers, or any thereof, may have ceased to be such officers at the time the said bonds, or some thereof, are certified, delivered or issued; or the said bonds, or any thereof, may be signed and sealed by the persons who may be such officers of the Company at the time the said bonds, or any thereof, are executed, certified, delivered or issued.

Section Eight. The interest coupons attached to the coupon bonds issued hereunder may be authenticated in the manner hereinabove provided, by the *fac simile* signature of the present Treasurer of the Company engraved thereon, notwithstanding he may have ceased to be such Treasurer at the time the said coupon bonds, or some thereof, are executed, certified, delivered or issued; or the said interest coupons may be authenticated by the *fac simile* signature engraved thereon of the person who may be the Treasurer of the Company at the time the said coupon bonds, or any thereof, are executed, certified, delivered or issued.

Section Nine. The Trustee, its successor or successors in the trusts hereby created, shall keep books at its office for the purpose of registration of the bonds issued hereunder, and upon presentation for registration shall register, as hereinafter provided, and under such reasonable regulations as it or they shall prescribe, any bonds issued hereunder. Such books for the purpose of such registration may also be kept at the office of a co-trustee or co-trustees in the said City of New York and in the said City of London.

Section Ten. The holder of any coupon bond issued hereunder, at his option, may have the same registered in his name on the said books kept for the purpose of registration, and such registration noted on such bond by the Trustee, its successor or successors in the trusts hereby created, or by a co-trustee or co-trustees, as the case may be. After such registration, no transfer of such bond shall be valid unless made on the said books by the registered holder, or by his duly authorized attorney, and similarly noted thereon. Such transfer on the said books may be made to bearer, and if so made to bearer the transferability of such bond by delivery shall thereby be restored; but registry of such bond may be made again, from time to time, in the name of the then holder, or transferability thereof by delivery may be restored, as before. The interest coupons appertaining to such bond shall be transferable by delivery, notwithstanding such registration, unless the holder of such bond shall surrender the same, with all unmatured interest coupons thereto appertaining, to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, for cancellation, in exchange for a registered bond without coupons, as hereinafter provided.

Section Eleven. The holder of any coupon bond, or coupon bonds, issued hereunder, at his option, except as hereinabove otherwise provided, may surrender the same, with all unmatured interest coupons thereto appertaining, to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, for cancellation, and receive in exchange therefor a registered bond without coupons, for a like amount of the principal thereof, as hereinafter provided. Any registered bond without coupons issued hereunder shall be transferable by the registered holder thereof, or by his duly authorized attorney, on the said books kept for the purpose of registration, on surrender thereof to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, for cancellation, and, thereupon, a new registered bond, or bonds, without coupons, for a like amount of the principal thereof, shall be issued to the

transferee thereof in exchange therefor, as hereinafter provided; or the registered holder of any registered bond without coupons issued hereunder, at his option, may surrender the same to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, for cancellation, and receive in exchange therefor a coupon bond, or coupon bonds, for a like amount of the principal thereof, with coupons attached maturing on and after the next ensuing interest due day, as hereinafter provided. The bonds so surrendered for cancellation, together with all unmatured interest coupons thereto appertaining, shall be cancelled by the Trustee, its successor or successors in the trusts hereby created. and when so cancelled the said bonds and interest coupons shall be delivered by the Trustee, its successor or successors in the trusts hereby created, to the Company.

Section Twelve. Whenever any coupon bond, or coupon bonds, issued hereunder, with all unmatured interest coupons thereto appertaining, shall be surrendered to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, for a registered bond without coupons, the Company shall execute, and the Trustee, its successor or successors in the trusts hereby created, or a co-trustee or co-trustees, as the case may be, shall certify and deliver, in exchange for such coupon bond, or coupon bonds, a registered bond without coupons, for a like amount of the principal thereof, which shall have endorsed thereon the same serial number, or numbers, of the coupon bond, or coupon bonds, so surrendered for exchange. Whenever any registered bond without coupons issued hereunder shall be surrendered to the Trustee, its successor or successors in the trusts hereby created, or to a co-trustee or co-trustees, for transfer, the Company shall execute, and the Trustee, its successor or successors in the trusts hereby created, or a co-trustee or co-trustees, as the case may be, shall certify and deliver to the transferee a new registered bond, for a like amount of the principal thereof, which shall have endorsed thereon the same serial number or numbers, of the coupon bond, or coupon bonds, endorsed upon the registered bond so surrendered; or, at the option of the holder of such registered bond, the Company shall execute, and the Trustee, its succssor or successors in the trusts hereby created, shall certify and the Trustee, its successor or uccessors in the trusts hereby created, or a co-trustee or co-trustees, shall deliver a coupon bond, or coupon bonds, for a like amount of the principal thereof, having the same serial number, or numbers, of the coupon bond, or coupon bonds, as endorsed upon the registered bond so surrendered, with coupons attached maturing on and after the next ensuing interest due day.

Section Thirteen. Whenever any bond to be issued hereunder shall be originally executed, certified and issued as a registered bond without coupons, there shall be reserved unissued by the Company a coupon bond, or coupon bonds, for a like amount of the principal thereof, and the serial number, or numbers, of such coupon bond, or coupon bonds, so reserved unissued shall be endorsed on such registered bond issued in lieu thereof.

Section Fourteen. Whenever any registered bond without coupons shall be issued hereunder, the coupon bond, or coupon bonds, bearing the serial number, or numbers, of such coupon bond, or coupon bonds, endorsed on such registered bond shall not be issued or outstanding contemporaneously therewith.

Section Fifteen. For any registration of a coupon bond issued hereunder, and for any exchange of a coupon bond for a registered bond without coupons, or for any exchange of a registered bond without coupons for a coupon bond, and for any transfer of a registered bond, the Company, at its option, may require the payment of a sum sufficient to reimburse it, or the Trustee, its successor or successors in the trusts hereby created, or a co-trustee or co-trustees, for any stamp tax or other governmental charge connected therewith, and also the further sum of one dollar ($1) for each bond so registered, exchanged or transferred.

Section Sixteen. The Company shall have the right to appoint, with the approval of the Trustee, its successor or successors in the trusts hereby created, by an instrument or instruments in writing, which shall be duly recorded in the office of the county recorder of each county or city and county in which this mortgage or deed of trust shall be recorded, one or more co-trustees; provided, however, that the rights and powers of such co-trustee or co-trustees shall be limited to the receipt for the purpose of exchange and to the exchange of bonds (coupon and registered) theretofore issued hereunder, to the exchange of registered bonds theretofore issued hereunder, to the certification of registered bonds for the purpose of such exchange, and to the registration of bonds (coupon and registered) issued hereunder, under such terms and conditions, not inconsistent with the provisions of this mortgage or deed of trust, as may be prescribed by the Company and approved by the Trustee, its successor or successors in the trusts hereby created.

Section Seventeen. In the event that any bond issued hereunder shall become mutilated, lost or destroyed, the Trustee, its successor or successors in the trusts hereby created, may certify,

and the Company may issue, upon payment to them of all costs thereby incurred, a new bond of like tenor, effect and date, and bearing the same serial number as the bond so mutilated, lost or destroyed, with like unpaid interest coupons thereto attached if such mutilated, lost or destroyed bond be a coupon bond, in exchange for, and upon the cancellation of, such mutilated bond and unpaid interest coupons, if any, thereto attached, or in substitution of the same, if lost or destroyed; but no such bond shall be so certified or issued in the event of such loss or destruction of any bond, in substitution therefor, unless the applicant for such substituted bond shall first furnish to the Company and to the Trustee, its successor or successors in the trusts hereby created, proof of such loss or destruction satisfactory to them, and also security satisfactory to them indemnifying them against any and all lawful claims on or to such lost or destroyed bond.

ARTICLE TWO.

Issue of Bonds, and Appropriation of Bonds and Proceeds of Sales of Bonds.

Section One. The amount of the bonds issued hereunder and outstanding at any one time shall not exceed in the aggregate the principal sum of ——— par value, in gold coin of the United States of America, of or equal to the present standard of weight and fineness, or the equivalent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid.

Section Two. The Company may execute, in the manner hereinabove provided, and deliver for certification to the Trustee, its successor or successors in the trusts hereby created, from time to time, such numbers of the bonds to be issued hereunder (coupon and registered), and in such proportions of the said respective denominations thereof, as the Board of Directors of the Company, from time to time, may determine, subject to the provisions hereinafter contained. The Trustee, its successor or successors in the trusts hereby created, shall certify, in the manner hereinabove provided, and delivered to the Company, or to its order, such of the said bonds so executed and delivered, for any of the purposes hereinafter enumerated, and none other, upon presentation to the Trustee, its successor or successors in the trusts hereby created, of an order or orders therefor in writing requesting such certification and delivery, executed in the name of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, and under its corporate seal, together with a copy or copies of the resolutions of

the Board of Directors of the Company, duly certified by its Secretary or Assistant Secretary under its corporate seal, authorizing the execution of such order or orders, and declaring such purpose or purposes for which the said bonds are to be used, and further declaring that the said bonds shall not be used for any other purpose or purposes than the purpose or purposes declared in such resolution or resolutions.

(a). Bonds, not to exceed in the aggregate the principal sum of ————, par value, subscribed for by, and sold by the Company to, various persons, shall be certified, in the manner aforesaid, by the Trustee, its successor or successors in the trusts hereby created, and delivered to the Company, or to its order, for the purpose of delivering the same to the said subscribers for and purchasers thereof.

(b). Bonds, not to exceed in the aggregate the principal sum of ———, par value, shall be certified, in the manner aforesaid, by the Trustee, its successor or successors in the trusts hereby created, and delivered to the Company, or to its order, for the purpose of exchanging the same for, or for the purpose of paying or redeeming, the outstanding First and Consolidated Mortgage, Series A, Six Per Cent., Sinking Fund, Twenty Year, Gold Bonds of the Company.

(c). Bonds, not to exceed in the aggregate the principal sum of ———, par value, if the same shall be required by the Company, shall be certified, in the manner aforesaid, by the Trustee, its successor or successors in the trusts hereby created, and delivered to the Company, or to its order, for the purpose of exchanging the same for, or for the purpose of purchasing, paying or redeeming, the outstanding bonds of the Hudson Development Company, a corporation.

(d). Bonds, not to exceed in the aggregate the principal sum of ———, par value, if the same shall be required by the Company, shall be certified, in the manner aforesaid, by the Trustee, its successor or successors in the trusts hereby created, and delivered to the Company, or to its order, for the purpose of exchanging the same for, or for the purpose of purchasing, paying or redeeming the outstanding bonds of Utah Land and Mining Company, a corporation.

(e). Bonds, not to exceed in the aggregate the principal sum of ———, par value, if the same shall be required by the Company, shall be certified, in the manner aforesaid, by the Trustee,

its successor or successors in the trusts hereby created, and delivered to the Company, or to its order, for the purpose of exchanging the same for, or for the purpose of purchasing, paying or redeeming, the outstanding bonds of Sunset Farms Company, a corporation.

(f). The remainder of the said bonds shall be certified, in the manner aforesaid, by the Trustee, its successor or successors in the trusts hereby created, and delivered to the Company, or to its order, for the purpose of paying, satisfying or discharging the indebtedness, obligations or liabilities incurred by the Company, from time to time, or for the purpose of reimbursing the Company for moneys which may have been theretofore expended by the Company, from time to time, in paying, satisfying or discharging the indebtedness, obligations or liabilities incurred by the Company.

Section Three. The Company shall have the right, at any time, or from time to time, to sell any or all of the said remainder of the bonds secured by this mortgage or deed of trust, which shall not have been theretofore certified and delivered by the Trustee, its successor or successors in the trusts hereby created, as hereinabove provided, for such prices and upon such terms as the Board of Directors of the Company may consider expedient and for the best interests of the Company. When any such sale or sales of bonds shall be made, the proceeds thereof shall be deposited with the Trustee, its successor or successors in the trusts hereby created, and the Trustee, its successor or successor in the trusts hereby created, shall certify, in the manner hereinabove provided, and delivered to the Company, or to its order, the bonds so sold, upon the presentation to the Trustee, its successor or successors in the trusts hereby created, of an order or orders therefor in writing, requesting such certification and delivery, executed in the name of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, and under its corporate seal, together with a copy or copies of the resolution or resolutions of the Board of Directors of the Company, duly certified by its Secretary or Assistant Secretary under its corporate seal, authorizing the execution of such order or orders, and stating the number of the bonds so sold and the prices for which, and the terms upon which, the bonds were sold.

In case any contract for the sale of the said bonds, or any thereof, shall be filed with the Trustee, its successor or successors in the trusts hereby created, by the Company, or by any other party to the said contract, the Trustee, its successor or successors in the trusts hereby created, may agree in writing with the Com-

pany, or with the other party or parties to such contract, that it will hold, subject to the provisions of such contract, such an amount of the said bonds as shall be required for delivery, from time to time, to the purchaser or purchasers thereof, upon payment therefor as in such contract provided; and so long as the purchaser or purchasers under such contract shall not be in default in the performance thereof, the Trustee, its successor or successors in the trusts hereby created, shall not be required to certify and deliver the said bonds, held subject to the provisions of such contract otherwise or for any other purpose.

Section Four. The Trustee, its successor or successors in the trusts hereby created, from time to time, shall pay to the Company, or to its order, the proceeds deposited with the Trustee, its successor or successors in the trusts hereby created, or any of the bonds issued hereunder which theretofore may have been sold, as hereinabove provided, only upon the presentation to the Trustee, its successor or successors in the trusts hereby created, of an order or orders therefor in writing, requesting such payment, executed in the name of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, and under its corporate seal, together with a copy or copies of the resolution or resolutions of the Board of Directors of the Company, duly certified by its Secretary or Assistant Secretary under its corporate seal, authorizing the execution of such orders or orders, and declaring the purpose or purposes aforesaid for which the said proceeds ordered to be paid are to be used, and further declaring that the said proceeds shall not be used for any other purpose or purposes than the purpose or purposes declared in such resolution or resolutions, which said purpose or purposes shall be as aforesaid, and none other.

Section Five. If the purpose or purposes aforesaid for which the bonds secured by these presents, or the proceeds thereof, are to be used as aforesaid, be to purchase, pay or redeem the said outstanding bonds of the said Hudson Development Company, or to purchase, pay or redeem the said outstanding bonds of the said Utah Land and Mining Company, or to purchase, pay or redeem the said outstanding bonds of the said Sunset Farms Company, such outstanding bonds shall be purchased, paid or redeemed at the lowest possible price at which the same can be purchased, paid or redeemed, and in no event shall the price at which any of the said outstanding bonds of the said Hudson Development Company, or of the said Sunset Farms Company, shall be purchased, paid or redeemed, exceed the principal thereof and the accrued interest thereon and a premium of five (5) per cent. of the principal thereof, and in no event shall the price at which

any of the said outstanding bonds of the said Utah Land and Mining Company shall be purchased, paid or redeemed exceed the principal thereof and the accrued interest thereon, and the said order or orders and the said resolution or resolutions of the Company, in every such case, shall also be accompanied by a certificate, signed by the President or one of the Vice Presidents, and by the Secretary or Assistant Secretary of the Company, and verified by the Secretary or Assistant Secretary of the Company, containing a statement of the price at which such outstanding bonds were purchased, paid or redeemed, and that such price was the lowest possible price at which the same could be purchased, paid or redeemed, and that none of the bonds secured by these presents were previously certified and delivered, nor any proceeds thereof previously paid by the Trustee, its successor or successors in the trusts hereby created, in respect thereof.

If the purpose or purposes aforesaid for which the bonds secured by these presents, or the proceeds thereof, are to be used as aforesaid, be to pay, satisfy or discharge the said indebtedness, obligations or liabilities incurred by the Company, from time to time, or to reimburse the Company for moneys which may have been theretofore expended by the Company, from time to time, in paying, satisfying or discharging the said indebtedness, obligations or liabilities incurred by the Company, the said order or orders and the said resolution or resolutions of the Company, in every such case, shall also be accompanied by a certificate, signed by the President or one of the Vice Presidents, and by the Secretary or Assistant Secretary, of the Company, and verified by the Secretary or Assistant Secretary, containing a statement of the said indebtedness, obligations or liabilities which it is the purpose or purposes to pay, satisfy or discharge, or in the payment, satisfaction or discharge of which moneys have been theretofore expended by the Company, and that such indebtedness, obligation or liabilities are, or were, as the case may be, *bona fide* and existing indebtedness, obligations or liabilities of the Company, and that none of the said bonds were previously certified and delivered, nor any proceeds thereof previously paid by the Trustee, its successor or successors in the trusts hereby created, in respect thereof. The amount, par value, of the bonds certified and delivered as aforesaid at any time, for the purpose of paying, satisfying or discharging the said indebtedness, obligations or liabilities incurred by the Company, or for the purpose of reimbursing the Company for moneys which may have been theretofore expended by the Company in paying, satisfying or discharging the said indebtedness, obligations or liabilities incurred by the Company, shall not exceed the amount of such indebted-

ness, obligations or liabilities as shown by the said statement contained in the said certificate.

Section Six. The order or orders, the resolution or resolutions, and the certificate or certificates, as aforesaid, shall be full and complete warrant and authority to the Trustee, its successor or successors in the trusts hereby created, for the certification and delivery of the said bonds issued hereunder, or for the payment of the said proceeds, as the case may be, and the receipts for the said bonds so delivered or for the moneys so paid, signed by the person or persons named in such order or orders, shall be full discharges therefor of the Trustee, its successor or successors in the trusts hereby created.

Section Seven. The Company hereby covenants and agrees that the bonds, or any proceeds of the sale of the bonds, issued hereunder, shall be used and applied by the Company solely for the purposes as herein provided.

Section Eight. The Trustee, its successor or successors in the trusts hereby created, except as hereinafter otherwise provided, shall cancel the bonds issued hereunder, and the interest coupons thereto appertaining, and shall destroy the signatures thereon, when and as the said bonds and interest coupons are purchased, paid or redeemed, as hereinafter provided, and surrendered to it or them, and when so canceled the said bonds and interest coupons shall be delivered by the Trustee, its successor or successors in the trusts hereby created, to the Company.

ARTICLE THREE.

Particular Covenants of the Company.

Section One. The Company hereby covenants and agrees that, at all times, until the purchase, payment or redemption of all the bonds issued hereunder and outstanding, as hereinafter provided, it will keep an office or agency in the said City and County of San Francisco, State of California, where notices and demands herein provided for may be served, and will keep the Trustee, its successor or successors in the trusts hereby created, informed of the place of such office or agency, or that it will designate for such purpose, from time to time, the office of a bank or trust company in the said City and County of San Francisco, by a written notice to the Trustee, its successor or successors in the trusts hereby created, and by an advertisement in a newspaper of general circulation published in the said City and County of San Francisco.

Section Two. The Company hereby further covenants and agrees that it will duly and punctually pay the principal and the interest of the bonds issued hereunder and outstanding, in gold coin of the United States of America, of or equal to the present standard of weight and fineness, or in the equavilent thereof in sterling money of Great Britain, at the fixed rate of exchange aforesaid, at the times and places, and in the manner specified in the said bonds and interest coupons and in this mortgage or deed of trust provided, according to the true intent and meaning thereof, and hereby further covenants and agrees that it will duly and punctually pay both the principal and the interest of the said bonds without any deduction from either principal or interest for any tax or taxes which the Company may be required or permitted to pay thereon, or to retain therefrom, under any present or future law of the United States of America, or of any State, County, Municipality, or other governmental subdivision therein.

Section Three. The Company hereby further covenants and agrees that it will duly pay and discharge all taxes, assessments and other governmental charges which shall or may, now or hereafter, be lawfully imposed upon the said property, real and personal, or any part thereof, hereby conveyed, assigned and transferred, or which shall or may, now or hereafter, be lawfully imposed upon this mortgage or deed of trust, so that the priority of the lien of this mortgage or deed of trust shall be fully preserved in respect of all the said property; provided, however, that nothing herein contained shall require the Company to pay any such tax, assessment or other charge so long as the validity thereof shall in good faith be contested.

The Trustee, its successor or successors in the trusts hereby created, or any one or more of the holders of the bonds issued hereunder and outstanding, in case default be made by the Company in the payment of any such taxes, assessments or other charges, so lawfully imposed, at its or their option, and without any impairment of, or prejudice to, its or their rights hereunder, may pay and discharge the same, and the Company shall, and it hereby covenants and agrees to, repay to the Trustee, its successor or successors in the trusts hereby created, or to the said holder or holders of the said bonds, as the case may be, on demand, all amounts expended by it or them for such purpose, together with interest thereon at the rate of ten (10) per cent. per annum from the date of each such payment until repaid, and the amounts so paid, with the said interest thereon, shall be and are hereby secured, and declared to be a charge upon the said property, real and personal, hereby conveyed, assigned and transferred.

Section Four. The Company hereby further covenants and agrees that it will well and truly keep, observe and perform any and all lawful obligations and regulations now or hereafter imposed upon it by any law of the United States of America, or by any law of any State, or by any ordinance of any County, Municipality or other governmentad subdivision of any State, or by any body or officer therein having jurisdiction or control thereof, as a condition of the continued enjoyment of the rights, privileges or franchises now owned or hereafter acquired by the Company, to the end that such rights, privileges and franchises may be maintained and preserved, and not become forfeited or in any manner impaired.

Section Five. The Company hereby further covenants and agrees that it will not voluntarily create or suffer to be created any lien or charge upon the said property, or any part thereof, hereby conveyed, assigned and transferred, having priority to, or preference over, the lien of this mortgage or deed of trust.

The Trustee, its successor or successors in the trusts hereby created, or any one or more of the holders of the bonds issued hereunder and outstanding, in case default be made by the Company in the payment or discharge of any such lien or charge upon the said property, or any part thereof, at its or their option, and without any impairment of, or prejudice to, its or their rights hereunder, may pay and discharge the same, and the Company shall, and it hereby covenants and agrees to, repay to the Trustee, its successor or successors in the trusts hereby created, or to the holder or holders of the said bonds, as the case may be, on demand, all amounts expended by it or them for such purpose, together with interest thereon at the rate of ten (10) per cent. per annum from the date of each such payment until repaid, and the amounts so paid, with the said interest thereon, shall be and are hereby secured, and declared to be a charge upon the said property, real and personal, hereby conveyed, assigned and transferred.

Section Six. The Company hereby further covenants and agrees that at all times it will maintain, preserve and keep all its tangible property used in connection with the operation of its mining, rock crushing, quarrying, reclamation and other business, in thorough repair and working order and condition, and that, from time to time, it will make all necessary and proper renewals, replacements, alterations, additions, betterments and improvements of the same. so that the efficiency of its said property and business shall at no time be or become impaired.

The Trustee, its successor or successors in the trusts hereby created, in case default be made by the Company in maintaining, preserving or keeping its said tangible property repaired, renewed or replaced, in the manner aforesaid, in its or their discretion, and without any impairment of, or prejudice to, its or their rights hereunder, may make all proper and needful repairs, renewals and replacements of the said property, and the Company shall, and it hereby covenants and agrees to, repay to the Trustee, its successor or successors in the trusts hereby created, on demand, all amounts expended by it or them for such purposes, together with interest thereon at the rate of ten (10) per cent. per annum from the date of each such expenditure until repaid, and the amounts so paid, with the said interest thereon, shall be and are hereby secured, and declared to be a charge upon the said property, real and personal, hereby conveyed, assigned and transferred.

Section Seven. The Company hereby further covenants and agrees that, from time to time, it will insure and keep insured such insurable property hereby conveyed and transferred, as may be reasonably in danger of destruction or injury by or through fire, and will duly and promptly pay the premiums for such insurance. The policies therefor shall be made payable, and shall be delivered, to the Trustee, its successor or successors in the trusts hereby created, and the same and all moneys that shall accrue thereunder, shall be held by the Trustee, its successor or successors in the trusts hereby created, under and subject to the lien of, and as a part of the security provided by, this mortgage or deed of trust.

In case any moneys shall be paid to the Trustee, its successor or successors in the trusts hereby created, on account of any loss covered by any such insurance, the Company shall be entitled to use and apply the same for the purpose either of reconstructing, replacing or repairing the property destroyed or injured, or for the betterment or improvement of any of the property hereby conveyed, assigned and transferred, and the Trustee, its successor or successors in the trusts hereby created, from time to time, shall pay to the Company, or to its order, the said moneys, upon the presentation to the Trustee, its successor or successors in the trusts hereby created, of an order or orders therefor in writing, requesting such payment, executed in the name of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, and under its corporate seal, together with a copy or copies of the resolution or resolutions of the Board of Directors of the Company, duly certified by its Secretary or Assistant Secretary, under its corporate seal, authorizing the exe-

cution of such order or orders, and declaring the purpose or purposes aforesaid for which the said moneys are to be used and applied, and further declaring that the said moneys shall not be used or applied for or to any purpose or purposes than the purpose or purposes declared in such resolution or resolutions. Any such moneys paid to the Trustee, its successor or successors in the trusts hereby created, on account of any loss covered by any such insurance, for which orders and resolutions shall be executed or presented as aforesaid, within the period of one (1) year after the receipt of such moneys by the Trustee, its successor or successors in the trusts hereby created, shall then be applied to and become a part of the sinking fund, hereinafter provided for the payment or redemption of the bonds issued hereunder. The said order or orders and the said resolution or resolutions shall be full and complete warrant and authority to the Trustee, its successor or successors in the trusts hereby created, for the payment of the said moneys, and the receipts for the moneys so paid, signed by the person or persons named in such order or orders, shall be full discharges therefor of the Trustee, its successor or successors in the trusts hereby created.

Section Eight. The Company hereby further covenants and agrees that it will promptly assign and deliver to the Trustee, its successor or successors in the trusts hereby created, all bonds and shares of the capital stock of other corporations, and all other securities now owned by or belonging to the Company, or hereafter in any manner acquired by the Company during the life or term if this mortgage or deed of trust, excepting from such assignment and delivery a sufficient number only of such shares of the capital stock to qualify directors; and such bonds, shares or capital stock and other securities shall be held by the Trustee, its successor or successors in the trusts hereby created, under and subject to the lien of, and as a part of the security provided by, this mortgage or deed of trust.

The Trustee, its successor or successors in the trusts hereby created, may cause to be transferred into its or their name, "as pledgee under the First Mortgage or Deed if Trust of A. B. Company of California, dated as of the first day of January A. D. 19—" any and all such shares of capital stock, except as aforesaid, which may have been assigned and delivered to it or them as aforesaid, or which may be held by it or them hereunder.

The Company, until default hereunder, as herein after provided, shall have the right otherwise to exercise the privileges of ownership, including the power to vote, with respect to any bonds or

shares of capital stock so assigned and deliverd to the Trustee, its successor or successors in the trusts hereby created, or so held by it or them; and the Trustee, its successor or successors in the trusts hereby created, from time to time, shall cause to be executed and delivered to the Company such proxy or proxies as shall be necessary or appropriate to carry into effect the foregoing provisions; provided, however, that no such proxy or proxies shall permit the voting of any such bonds or shares of capital stock, nor shall any such bonds or shares of capital stock be voted, for any purpose which, in the judgment of the Trustee, its successor or successors in the trusts hereby created, will lessen the value of the security afforded by this mortgage or deed of trust.

Section Nine. The Company hereby further covenants and agrees that, at any time, when requested by the Trustee, its successor ir successors in the trusts hereby created, so to do, it will make, execute, acknowledge and deliver to the Trustee, its successor or successors in the trusts hereby created, and cause to be properly recorded, such deeds, conveyances, assignments, transfers and other instruments as shall or may be necessary or proper for more fully and certainly assuring, vesting in and confirming to it or them all the estate and property hereby conveyed, assigned and transferred, or intended so to be, or more fully to effectuate the intention of these presents, or more fully to secure the payment of the principal and interest of the bonds issued and to be issued hereunder.

Section Ten. The Company hereby further covenants and agrees that, upon the written request of the Trustee, its successor or succesors in the trusts hereby created, or of the holder or holders of twenty (20) per cent., or more in amount of the principal of the bonds issued hereunder and then outstanding, it will furnish and deliver thereto, as often and in such form as may be reasonable, a statement in writing, signed by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, showing the earnings and operating expenses of the Company for a period of at least one (1) year immediately prior to the time of making such request.

ARTICLE FOUR.

Remedies of Trustee and Bondholders.

Section One. If default shall be made in the payment of any interest on any of the bonds issued hereunder and outstanding, and if such default shall continue for the period of two (2)

months, or if default shall be made in the payment of the principal of any of the said bonds, or if default shall be made in the performance of any covenant or agreement herein contained, to be kept or performed by the Company, other than for the payment of the principal and the interest of the said bonds, and if any such last mentioned default shall continue for the period of one (1) month after written notice thereof to the Company from the Trustee, its successor or successors in the trusts hereby created, or from the holder or holders of twenty (20) per cent. or more in amount of the principal of the bonds issued hereunder and outstanding, then and in each and every such case, the Trustee, its successor or successors in the trusts hereby created, may, and upon the written request of the holder or holders of a majority in amount of the principal of the bonds issued hereunder and outstanding, shall, forthwith, by its or their agents and servants, enter upon and take and hold possession of, all and singular the tangible property, real and personal, hereby conveyed, assigned, and transferred, and may exclude the Company, its agents and servants therefrom, and, having and holding the same, may manage, control and operate the said property, and carry on the business and exercise all the rights and powers of the Company, either in the name of the Company or otherwise, as the Trustee, its successor or successors in the trusts hereby created, shall deem best, and, from time to time, and at the expense of the trust estate, may make all necessary and proper repairs, renewals, replacements, alterations, additions, betterments and improvements of and upon the said property, and may insure and keep insured such of the said property as may be insurable, against destruction thereof or injury thereto by or through fire or other peril, and shall be entitled to take, collect and receive all revenues, rents, issues, incomes, earnings and profits of the said property and business, and shall apply the same as follows:

First. To the payment of all proper expenses, costs and other charges of holding, managing, controlling and operating the said property and conducting the said business, including a reasonable compensation to the Trustee, its successor or successors in the trusts hereby created, for its or their services, and for the services of such attorneys, counsellors, agents and servants as may be by it or them properly employed, in relation thereto, and to the payment of all taxes, assessments and other governmental charges which may be imposed upon the said property, and all liens thereon prior to the lien of these presents, and all necessary and proper repairs, renewals, replacements, alterations, additions, betterments and improvements thereof and thereon, and all such insurance thereof; and

Second. To the payment, ratably, without discrimination or preference, of the interest due and unpaid on the bonds issued hereunder and outstanding, in the order in which such interest shall have become due (with interest at the rate of six (6) per cent. per annum on the overdue installments of interest thereon from the time the same shall have become due until paid), and, after paying such interest, with interest thereon as aforesaid, to the payment, ratably, without discrimination or preference, of the principal of the bonds issued hereunder and outstanding, which shall have become due by declaration or otherwise; and

Third. If any surplus shall remain after the payment aforesaid, such surplus shall be paid over to the Company, its successors or assigns.

Upon the payment in full, as aforesaid, of whatever may be due for interest and principal, and payable hereunder for other purposes, the said property so entered upon shall be redelivered to the Company.

In the event that the Company shall make default in any of the respects hereinabove mentioned, and in the event also that during the continuance of such default a receiver shall be appointed for the Company, or a judgment or order be entered for the sequestration of its property in any judicial proceeding instituted by any party other than the Trustee, its successor or successors in the trusts hereby created, then and in such case, the Trustee, its successor or successors in the trusts hereby created, shall be entitled forthwith to exercise the right of entry herein conferred, whether the aforesaid demand be made or notice given or not, and whether the said default period shall have expired or not, and shall also be entitled to any and all other rights and powers herein conferred upon and provided to be exercised by the Trustee, its successor or successors in the trusts hereby created, upon the occurrence and continuance of the defaults herein provided by the Company.

Section Two. If default shall be made in the payment of any interest on any of the bonds issued hereunder and outstanding, and if such default shall continue for the period of two (2) months, then and in such case the Trustee, its successor or successors in the trusts hereby created, may, and upon the written request of the holder or holders of a majority in amount of the principal of the bonds issued hereunder and outstanding, shall, forthwith, by notice in writing delivered to the Company, declare the principal of all of the bonds issued hereunder and outstanding to be due and payable immediately, whether entry be made as

hereinabove provided or not, and whether judicial proceedings for the foreclosure of this mortgage or deed of trust, or for the sale of the said property hereby conveyed, assigned and transferred, under the power of sale, as hereinafter provided, be instituted or not, and thereupon the same shall become and be wholly due and payable, anything in the said bonds or in this mortgage or deed of trust contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time, after the principal of the bonds issued hereunder and outstanding shall have been so declared due and payable, all arrears of interest upon the said bonds (with interest at the rate of six (6) per cent. per annum on the overdue installments of interest thereon from the time the same shall have become due until paid) and all proper expenses, costs and other charges in the premises, of the Trustee, its successor or successors in the trusts hereby created, including a reasonable compensation for its or their services, and for the services of such attorneys, counsellors, agents and servants as may be by it or them properly employed in relation thereto, shall be paid by the Company, and all other defaults, if any shall exist, shall be made good, before any sale of the said property hereby conveyed, assigned and transferred shall have been made as in this Article provided, then and in such case, the holder or holders of a majority in amount of the principal of the bonds issued hereunder and outstanding, by a written notice or notices to the Company and to the Trustee, its successor or successors in the trusts hereby created, may waive such default and its consequences, and obtain from the Trustee, its successor or successors in the trusts hereby created, a rescission of the said declaration that the principal of the bonds issued hereunder and outstanding shall be due and payable, and thereupon and thenceforward all of the said bonds and interest coupons shall mature otherwise according to their terms, unless by reason of some subsequent default a new declaration of maturity of the said bonds shall be made as aforesaid by the Trustee, its successor or successors in the trusts hereby created. No such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon.

Section Three. If default shall be made in the payment of any interest on any of the bonds issued hereunder and outstanding, and if such default shall continue for the period of two (2) months, or if default shall be made in the payment of the principal of any of the said bonds, or if default shall be made in the performance of any covenant or agreement herein contained, to be kept or performed by the Company, other than for the payment of the principal and interest of the said bonds, and if such last

mentioned default shall continue for the period of one (1) month after written notice thereof by the Company from the Trustee, its successor or successors in the trusts hereby created, or from the holder or holders of twenty (20) per cent. or more in amount of the principal of the bonds issued hereunder and outstanding, then and in each and every such case (unless judicial proceedings for the foreclosure of this mortgage of deed of trust, as hereinafter provided, shall have been theretofore instituted), the Trustee, its successor or successors in the trusts hereby created, may, and upon the written request of the holder or holders of a majority in amount of the principal of the bonds issued hereunder and outstanding, shall, forthwith, sell, whether entry be made as hereinabove provided or not, all and singular the said property, real and personal, including the rights, privileges and franchises, and the shares of the capital stock, bonds and other securities of other corporations, hereby conveyed, assigned and transferred, in the manner following, namely: The said sale shall be at public auction, in the said City and County of San Francisco, or in the City of Sacramento, County of Sacramento, State of California, as the Trustee, its successor or successors in the trusts hereby created, in its or their discretion shall determine and order, and the Trustee, its successor or successors in the trusts hereby created, shall publish a notice of the time and place of the said sale, with a description of the property, real and personal, to be sold (such description to be sufficient for the identification of the property to be sold), at least once a week for at least eight (8) successive weeks, in a newspaper of general circulation published in the said City and County of San Francisco, and also in a newspaper of general circulation published in the said City of Sacramento, and, from time to time, may postpone the said sale by publication, and on the day of sale so advertised, or on the day to which the said sale may be postponed, theTrustee, its successor or successors in the trusts hereby created, except as herein otherwise provided, may sell the property so advertised, in bulk or as an entirety, or in lots or parcels, and upon such terms as to payment or credit, as the Trustee, its successor or successors in the trusts hereby created, may deem to be for the best interests both of the holders of the bonds issued hereunder and outstanding, and of the Company, and the said property shall be sold in each and every instance for the highest price offered.

Section Four. If default shall be made in the payment of any interest on any of the bonds issued hereunder and outstanding, and if such default shall continue for the period of two (2) months, or if default shall be made in the payment of the principal of any of the said bonds, or if default shall be made in the

performance of any covenant or agreement herein contained, to be kept or performed by the Company, other than for the payment of the principal and interest of the said bonds, and if such last mentioned default shall continue for the period of one (1) month after written notice thereof to the Company from the Trustee, its successor or successors in the trusts hereby created, or from the holder or holders of twenty (20) per cent. or more in amount of the principal of the bonds issued hereunder and outstanding, then and in each and every such case, the Trustee, its successor or successors in the trusts hereby created, may, and upon the written request of the holder or holders of a majority in amount of the principal of the bonds issued hereunder and outstanding, shall, forthwith, proceed to protect or enforce its or their rights, or the rights of the holders of the bonds issued hereunder and outstanding, by a suit for the foreclosure of this mortgage or deed of trust (unless proceedings for the sale of the property hereby conveyed, assigned and transferred, under the power of sale hereinabove provided for, shall have been theretofore instituted), or by a suit or action for an injunction, specific performance, or for any other appropriate, equitable or legal remedy in the premises.

Section Five. Upon the filing of a bill in equity, or upon the commencement of any other judicial proceeding, by the Trustee, its successor or successors in the trusts hereby created, to protect or enforce its or their rights, or the rights of the holders of the bonds issued hereunder and outstanding, the Trustee, its successor or successors in the trusts hereby created, shall be entitled to exercise the said right of entry, and also any and all rights and powers herein conferred upon and provided to be exercised by the Trustee, its successor or successors in the trusts hereby created, upon the occurrence and continuance of defaults herein provided by the Company, except as herein otherwise provided, and the Trustee, its successor or successors in the trusts hereby created, shall also be entitled to the appointment of a receiver of the property hereby conveyed, assigned and transferred, including the revenues, rents, issues, incomes, earnings and profits thereof, with such powers as the court making such appointment shall confer.

Section Six. Except as herein otherwise provided, no remedy in this mortgage or deed of trust conferred upon or reserved to the Trustee, its successor or successors in the trusts hereby created, or to the holder or holders of the bonds issued hereunder and outstanding, is intended to be exclusive of any other remedy, but every remedy in this mortgage or deed of trust so conferred or reserved shall be cumulative, and shall be in addition to every

other remedy given hereunder or now or hereafter existing at law or in equity or by statute; and every right, power and remedy conferred upon or reserved to the Trustee, its successor or successors in the trusts hereby created, or to the holder or holders of the bonds issued hereunder and outstanding, may be exercised from time to time and as often as may be deemed expedient.

Section Seven. No delay or omission of the Trustee, its successor or successors in the trusts hereby created, or of the holder or holders of the bonds issued hereunder and outstanding, to exercise any right, power or remedy arising from any default by the Company, as herein provided, shall impair any such right, power or remedy, or shall be construed to be a waiver of any such default or an acquiescence therein.

Section Eight. In case the Trustee, its successor or successors in the trusts hereby created, shall have proceeded to protect or enforce any right, power or remedy under this mortgage or deed of trust, by entry, foreclosure or otherwise, and such proceedings shall have been discontinued or abandoned, because of a waiver or for any other reason, or shall have been determined adversely to the Trustee, its successor or successors in the trusts hereby created, then and in every such case, the Company and the Trustee, its successor or successors in the trusts hereby created, shall severally and respectively be restored to their former positions and right hereunder, in respect to the property hereby conveyed, assigned and transferred, and all rights, powers and remedies of the Trustee, its successor or successors in the trusts hereby created, shall continue as though no such proceedings had been taken.

Section Nine. In case of a sale of the property hereby conveyed, assigned and transferred, by virtue of a judgment or decree of foreclosure and sale, or by virtue of other judicial proceedings, the said property, including the rights, privileges and franchises, and the shares of the capital stock, bonds and other securities of other corporations hereby conveyed, assigned and transferred, may be sold in bulk or as an entirety, or in lots or parcels, as may be directed by a court of competent jurisdiction, or as the Trustee, its successor or successors in the trusts hereby created, in its or their discretion may otherwise determine; but the holder or holders of a majority in amount of the principal of the bonds issued hereunder and outstanding, from time to time, by an instrument or instruments in writing for that purpose, delivered to the Trustee, its successor or successors in the trusts hereby created, may direct and control the method of conducting any such sale, or any sale made under the power of sale herein

conferred upon the Trustee, its successor or successors in the trusts hereby created, anything in this mortgage or deed of trust to the contrary notwithstanding.

Section Ten. Upon the completion of any sale or sales of the property conveyed, assigned and transferred, made by the Trustee, its successor successors in the trusts hereby created, under the power of sale herein conferred, the Trustee, its successor or successors in the trusts hereby created, under the power of sale herein conferred, the Trustee, its successor or successors in the trusts hereby created, shall make, execute, acknowledge and deliver to the purchaser or purchasers thereof, his or their heirs or assigns, good and sufficient instruments of conveyance, assignment, transfer and release of the property so sold, or if such sale or sales be made under judicial proceedings, shall make, execute, acknowledge and deliver, in conjunction with the instruments of conveyance, assignment and transfer of the sheriff, commissioner or other officer making such sale or sales, proper instruments of conveyance, assignments, transfer and release of the property so sold. The Trustee, its successor or successors in the trusts hereby created, is and they are, hereby appointed the true and lawful attorney or attorneys, irrevocable, of the Company, in its name and stead, to make, execute, acknowledge and deliver all instruments of conveyance, assignment, transfer and release of the property so sold, and of the right of redemption or right of possession thereof, which may be necessary or proper in the execution of the powers hereby granted, and may substitute one or more persons or corporations with like power, the Company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof. The Company, if so requested by the Trustee, its successor or successors in the trusts hereby created, shall ratify and confirm such sale or sales by making, executing, acknowledging and delivering to the Trustee, its successor or successors in the trusts hereby created, or to such purchaser or purchasers, all proper instruments of conveyance, asignment and transfer which may be designated in such request.

Section Eleven. Any sale or sales of the property hereby conveyed, assigned and transferred, whether made by the Trustee, its successor or successors in the trusts hereby created, under the power of sale hereby conferred, or made under or by virtue of judicial proceedings, shall absolutely divest all right, title, interest, estate, claim and demand whatsoever, both at law and in equity, of the Company of, in or to the property so sold, and shall be a perpetual bar, both at law and in equity, against the Company and against

any and all persons claiming or to claim the property so sold, or any part thereof, from, through or under the Company, its successors or assigns, who shall have no right of redemption from any such sale.

Section Twelve. In case of any sale of the property hereby conveyed, assigned and transferred, whether made by the Trustee, its successor or successors in the trusts hereby created, under the power of sale herein conferred, or made under or by virtue of judicial proceedings, the purchaser or purchasers thereat shall be entitled, in making settlement for or payment of the property purchased, to apply towards the payment of the purchase price, and to be credited with, the principal of any bonds and any interest due and unpaid thereon, or any interest coupons due and unpaid, held by such purchaser or purchasers, to the extent of the amount which would be payable upon such bonds, interest and interest coupons upon a distribution among the holders thereof of the net proceeds of such sale or sales after making the deductions allowable under the terms hereof for the expenses, costs and other charges of the sale or sales, or otherwise; but such bonds, interest and interest coupons so used or applied by the purchaser or purchasers towards the payment of the purchase price, shall be deemed to be paid only to the extent so applied.

Section Thirteen. At any sale of the property hereby conveyed, assigned and transferred, whether made by the Trustee, its successor or successors in the trusts hereby created, under the power of sale herein conferred, or made under or by virtue of judicial proceedings, the Trustee, its successor or successors in the trusts hereby created, or any of the holders of the bonds issued hereunder and outstanding, may bid for and purchase the said property and make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain, and dispose of the property so sold without further accountability.

Section Fourteen. The receipt or receipts of the Trustee, its successor or successors in the trusts hereby created, or of the Court officer conducting any sale of the property hereby conveyed, assigned and transferred, for the purchase price of the property sold hereunder, shall be sufficient discharge or discharges to the purchaser or purchasers of the property so sold, for his or their purchase money, and no purchaser or purchasers, or his or their heirs, representatives or assigns, after paying such purchase money and receiving such receipt or receipts, shall be bound to see to the application of such purchase money upon or for any of the trusts or purposes of this mortgage or deed of

trust, or be answerable in any manner whatsoever for any loss, misapplication or non-application of any such purchase money, or any part thereof.

Section Fifteen. The purchase money, proceeds and avails of any sale of the property hereby conveyed, assigned and transferred, whether made by the Trustee, its successor or successors in the trusts hereby created, under the power of sale herein conferred, or made under or by virtue of judicial proceedings, together with any other moneys which may be then held by, or payable to, the Trustee, its successor or successors in the trusts hereby created, under any of the provisions of this mortgage or deed of trust, or otherwise, as a part of the trust estate, shall be applied as follows:

First: To the payment of all proper expenses, costs and other charges of the said sale, including a reasonable compensation to the Trustee, its successor or successors in the trusts hereby created, for its or their services, and for the services of such attorneys, counsellors, agents and servants as may be by it or them properly employed, in relation thereto, and to the payment of all proper expenses and charges incurred and disbursements made by the Trustee, its successor or successors in pursuant to the provisions hereof, and to the payment of all taxes, assessments and other governmental charges which may be imposed upon the said property, and all liens thereon prior to the lien of these presents, except liens subject to which such sale shall have been made; and

Second: To the payment, ratably, without discrimination or preference, of the interest due and unpaid on the bonds issued hereunder and outstanding, in the order in which such interest shall have become due (with interest at the rate of six (6) per cent. per annum on the overdue installments of interest thereon from the time the same shall have become due until paid), and, after paying such interest, with interest thereon as aforesaid, to the payment, ratably, without discrimination or preference, of the principal of the bonds issued hereunder and outstanding, which shall have become due by declaration or otherwise; and

Third: If any surplus shall remain after the payment aforesaid, such surplus shall be paid over to the Company, its successors or assigns.

Section Sixteen. Any notice, request or other instrument to be signed or executed by the holder or holders of the bonds issued

hereunder, as herein provided, may be in any number of documents of similar tenor, and may be signed or executed by such holder or holders of the said bonds in person, or by agent or attorney thereof duly appointed in writing. The execution of such notice, request or other instrument, or of a writing appointing such agent or attorney, shall be sufficient for any purpose of this mortgage or deed of trust, and shall be conclusive in favor of the Trustee, its successor or successors in the trusts hereby created, subject to the provisions hereinafter contained, with regard to any action taken by it or them under such notice, request or other instrument, if the fact and date of the execution by any person of such notice, request of other instrument, of such writing, be proved by the certificate of acknowledgment of any notary public or other officer authorized to take acknowledgments of deeds to be recorded in any State within the United States of America.

Section Seventeen. No holder or holders of any of the bonds of interest coupons secured hereby shall have the right to institute or maintain any action, suit or proceeding, at law or in equity, or by virtue of any statute, upon or in respect of the said bonds or interest coupons, or of this mortgage or deed of trust, for the foreclosure of this mortgage or deed of trust, or for an injunction, or for the appointment of a receiver, or for any other remedy, unless the notice or notices, request or requests shall have been first given and made, as hereinabove provided, and the conditions hereinafter provided shall have been fulfilled by such holder or holders, and the Trustee, its successor or successors in the trusts hereby created, shall have been afforded a reasonable opportunity itself or themselves to institute such action, suit or proceeding, or to execute the powers and trusts herein provided, it being understood and intended that no holder or holders of the bonds and interest coupons secured hereby shall have any right in any manner whatever to affect, disturb or prejudice the lien of or security afforded by this mortgage or deed of trust, by any action, suit or proceeding, at law or in equity, or by virtue of any statute, or to enforce any right thereon or hereunder, except in the manner hereinabove provided, and that all proceedings hereunder shall be instituted and maintained, as hereinabove provided, and for the equal benefit of all the holders of the said bonds and interest coupons secured hereby.

Section Eighteen. No interest coupon appertaining to any bond issued hereunder, which, in any manner, on or after the date of the maturity thereof, shall be assigned, transferred or pledged separate and apart from the bond to which the same

appertains, unless accompanied by such bond, shall be entitled, in case of default hereunder, to the benefit or security of this mortgage or deed of trust, except subject to the prior payment in full of the principal of all bonds issued hereunder and outstanding and of all interest coupons on all the said bonds not so assigned, transferred or pledged.

Section Nineteen. No recourse to or upon any liability, whether constitutional, statutory or otherwise, which shall now exist or which shall hereafter accrue, shall be had by the Trustee, its successor or successors in the trusts hereby created, of by any holder or holders of any of the bonds or interest coupons secured hereby, or by any present or future stockholder of the Company, either directly or through the Company, or otherwise, against any present or future stockholder, director or other officer of the Company, for the payment of the principal or the interest of any of the bonds issued hereunder, or for any claim based thereon or in respect thereof, or on or in respect of any of the provisions herein contained; and the Trustee, its successor or successors in the trusts hereby created, and every holder or holders of any of the said bonds or interest coupons secured hereby, shall look for the payment of the principal and the interest of the said bonds solely to the assets of the Company, and to the moneys paid hereunder to the Trustee, its successor or successors in the trusts hereby created, it being understood that the said assets and the said moneys paid hereunder shall be considered as embracing any and every claim, which under any circumstances, might be enforceable either by the Trustee, its successor or successors in the trusts hereby created, or by any holder or holders of any of the said bonds or interest coupons, or by any present or future stockholder of the Company, or by the Company, itself, against any present or future stockholder, director or other officer of the Company, under any law now or hereafter in force.

ARTICLE FIVE.

Sales, Exchanges, Releases and Changes of Mortgaged Properties.

Section One. The Company, at any time before default is made in the payment of the principal or interest of any of the bonds issued hereunder, from time to time, may sell, either at public auction or private sale, and for such prices and upon such terms as may be fair, free and clear from this mortgage or deed of trust, and the lien created hereby, any of the dredges rock crushers, engines, boilers, cars, motors, dynamos, converters,

transformers, pumps, towers, poles, lines, cables, wires and other machinery, apparatus, materials and supplies, held subject to the machinery, apparatus, appliances, implements, tools, equipment, materials and supplies, held subject to the lien hereof, which shall have become or shall be unsuitable or unnecessary for the use of the Company.

Section Two. The company, at any time before default is made in the payment of the principal or interest of any of the bonds issued hereunder, from time to time, may also sell, either at public auction or private sale, and for such prices and upon such terms as may be fair, or exchange upon like terms, free and clear from this mortgage or deed of trust and the lien created hereby, any of the real property, or any of the property other than that hereinabove in this Article enumerated, held subject to the lien of these presents, and upon such sale or sales, exchange or exchanges, the Trustee, its successor or successors in the trusts hereby created, shall make, execute, acknowledge and deliver, at the expense of the Company, but subject to the provisions hereinafter contained, proper and sufficient releases from the lien and operation of this mortgage or deed of trust of the property so sold or exchanged.

Section Three. The releases, hereinabove referred to, by the Trustee, its successor or successors in the trusts hereby created, of the property so sold or exchanged, shall be made only upon presentation to the Trustee, its successor or successors in the trusts hereby created, of an order or orders in writing requesting such releases, executed in the name of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, and under its corporate seal, together with a copy or copies of the resolution or resolutions of the Board of Directors of the Company, duly certified by its Secretary or Assistant Secretary under its corporate seal, authorizing the execution of such order or orders.

Section Four. The said order or orders requesting the said releases and the said resolution or resolutions authorizing the execution of the said order or orders, shall be full and complete warrant and authority to the Trustee, its successor or successors in the trusts hereby created, for the making, execution, acknowledgment and delivery of the said releases from the lien and operation of this mortgage or deed of trust of the property so sold or exchanged.

Section Five. The proceeds of any and all sales made as here-

inabove in this Article provided, and also all moneys received as compensation for any property subject to the lien hereof, which may be taken by the exercise of the power of eminent domain, shall be forthwith deposited with the Trustee, its successor or successors in the trusts hereby created, and the same shall be held by the Trustee, its successor or successors in the trusts hereby created, subject to the lien of, and as a part of the security provided by, this mortgage or deed of trust. The said proceeds and moneys, except that portion thereof which shall be applied by the Trustee, its successor or successors in the trusts hereby created, as and for the sinking funds, as hereinafter provided, nevertheless may be paid out, from time to time, but only as hereinafter provided. The Company hereby covenants and agrees to pay, or cause to be paid, to the Trustee, its successor or successors in the trusts hereby created, the said proceeds of any and all sales so made, and the said moneys so received as compensation for any property, subject to the lien hereof, which may be taken by the exercise of the power of eminent domain, forthwith upon the receipt of the same.

Section Six. The proceeds of any and all sales made as hereinabove in this Article provided, and the moneys received as compensation for any of the property subject to the lien hereof which may be taken by the exercise of the power of eminent domain, except that portion thereof which shall be applied by the Trustee, its successor or successors in the trusts hereby created, as and for the said sinking funds, as hereinafter provided, may be expended by the Company, from time to time in the construction, reconstruction, equipment, betterment or improvement of its other property, or in the purchase or other acquisition by the Company of property, real and personal, necessary or proper for the use of the Company, or for any other legitimate or proper purpose whatever of the Company.

The Trustee, its successor or successors in the trusts hereby created, from time to time, shall pay to the Company, or to its order, the said proceeds and moneys, or any thereof, deposited with it or them as aforesaid, except that portion thereof which shall be applied by the Trustee, its successor or successors in the trusts hereby created, as and for the said sinking funds, as herein after provided, in like manner and subject to like restrictions and conditions as the payment by it or them of the proceeds of the bonds issued hereunder, as hereinabove in Article Two hereof provided. Any of the said proceeds and moneys so deposited, and subject to be expended by the Company as aforesaid, for which orders and resolutions shall not be executed or presented, as hereinabove provided, within the period of one (1) year after

the receipt of such proceeds or moneys by the Trustee, its successor or successors in the trusts hereby created, shall then be applied to and become a part of the sinking fund hereinafter provided for the payment or redemption of the bonds issued hereunder. The order or orders of the Company requesting the payment of such proceeds and moneys and the resolution or resolutions of the Board of Directors of the Company authorizing the execution of such order or orders, shall be full and complete warrant and authority to the Trustee, its successor or successors in the trusts hereby created, for the payment of the said moneys and proceeds, and the receipts for the moneys and proceeds so paid, signed by the person or persons named in such order or orders, shall be full discharges therefor of the Trustee, its successor or successors in the trusts hereby created.

Section Seven. All property, real and personal, acquired by purchase or exchange, as hereinabove in this Article provided, as well as all property, real and personal, otherwise in any manner acquired by the Company during the life or term of this mortgage or deed of trust, immediately upon such acquisition, shall become subject to the lien and provisions of this mortgage or deed of trust, and, upon request of the Trustee, its successor or successors in the trusts hereby created, shall be forthwith conveyed, assigned and transferred to the Trustee, its successor or successors in the trusts hereby created, and shall be held by the Trustee, its successor or successors in the trusts hereby created, upon the trusts and for the purposes of these presents.

Section Eight. In no event shall the purchaser or purchasers of any property sold or exchanged under the provisions of this Article, or the Trustee, its successor or successors in the trusts hereby created, be required to see to the application of the purchase money paid, or the property exchanged, by him or them, upon or for any of the trusts or purposes of this mortgage or deed of trust, or be answerable in any manner whatsoever for any loss, misapplication or non-application of any such purchase money or property, or any part thereof.

Section Nine. The Company, at any time before default is made in the payment of the principal or interest of any of the bonds issued hereunder, from time to time, may make such changes, modifications, alterations, substitutions, renewals or extensions in or of, any leases and other contracts, subject to the lien of this mortgage or deed of trust, as the Board of Directors of the Company may deem expedient, but in such event any such changed, modified, altered, substituted, renewed or extended

leases and other contracts, shall become forthwith subject to the lien and provisions of this mortgage or deed of trust.

Section Ten. The Company, at any time before default is made in the payment of the principal or interest of any of the bonds issued hereunder, from time to time, without impairing the lien or security afforded by these presents, may make such changes in the location of the shops, mills, levees, works, dams, reservoirs, aqueducts, canals, ditches, flumes, mains, pipes, conduits, power houses, transformer houses, stations, towers, poles and all other buildings and structures, dredges, rock crushers, engines, boilers, cars, motors, dynamos, converters, transformers, pumps and all other machinery, apparatus, appliances, implements, tools, equipments and other movable property, held subject to the lien hereof, and such alterations and changes thereof, as the Board of Directors of the Company may deem expedient.

Section Eleven. In case a receiver lawfully appointed shall be in possession of the property hereby conveyed, assigned and transferred, the powers of sale and exchange, in and by this Article conferred upon the Company, may be exercised by such receiver, and in case the Trustee, its successor or successors in the trusts hereby created, shall be in possesion of the aid property hereby conveyed, assigned and transferred, then the powers in and by this Article conferred upon the Company may be exercised by the Trustee, its successor or successors in the trusts hereby created.

ARTICLE SIX.

Redemption and Payment of Bonds.

Section One. The Company may redeem at its option, all, or any number less than all, of the bonds issued hereunder and outstanding, prior to the maturity thereof, on the date of payment of any semi-annual installment of interest thereon, upon the payment of the principal thereof and all interest due thereon at the date of such redemption, together with a premium of ten (10) per cent. of the principal thereof, in the manner following, namely: Whenever and as often as the Board of Directors of the Company shall determine so to redeem any number less than all of the said bonds, the said Board of Directors shall adopt, and cause to be entered in the minutes of the proceedings of the said Board of Directors, a resolution that the said Board of Directors has determined to redeem a number less than all of the said bonds, and the said resolution shall fix and designate the amount, par value, of the said bonds to be redeemed, the date of such redemp-

tion, and the place, to wit, the office of the Trustee, its successor or successors in the trusts hereby created, in the said City and County of San Francisco, or the office of the said United States Mortgage & Trust Company, in the said City of New York, or the office of the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the respective holders of the said bonds selected for redemption may elect, where the same will be so redeemed, and the said Board of Directors shall thereupon select by lot, and record in the said minutes, the serial numbers and the respective denominations of the bonds so to be redeemed, and shall thereafter cause to be published a notice, at least once a week for at least four (4) successive weeks prior to the date of such redemption, in a newspaper of general circulation published in the said City and County of San Francisco, and also in a newspaper of general circulation published in the said City of New York, and also in a newspaper of general circulation published in the said City of London, which said notice shall designate the respective serial numbers and the respective denomination of the bonds which shall have been so selected for redemption and the date on which, and the places where, the same will be so redeemed, by the payment of the principal thereof and all interest due thereon at the date of such redemption, together with a premium of ten (10) per cent. of the principal thereof, and shall state that interest thereon after the said rate of redemption shall cease. If the said Board of Directors shall determine so to redeem all of the said bonds, the said Board of Directors shall adopt, and cause to be entered in the said minutes, a resolution that the said Board of Directors has determined to redeem all of the said bonds, and the said resolution shall fix and designate the date of such redemption and the places aforesaid where the said bonds will be so redeemed, and the said Board of Directors shall thereafter cause to be published as aforesaid a notice as aforesaid.

Section Two. Upon the completion of the said notice of redemption and on the date and at the places designated in such notice, the principal of the said bonds so selected or designated for redemption as aforesaid, and all interest due therefrom at the said date, together with a premium of ten (10) per cent. of the principal thereof, shall be due and payable, and thereupon the Company will pay, and it hereby covenants and agrees to pay, such principal, interest and premium as aforesaid, in gold coin of the United States of America, of or equal to the present standard of weight and fineness upon the presentation and surrender to the Trustee, its successor or successors in the trusts hereby created, or to the said United States Mortgage & Trust Company, in the said City of New York, or in sterling money of Great

Britain, at the fixed rate of exchange of four and eight hundred and sixty-five one-thousandths dollars ($4,865) per pound, to the said London County and Westminster Bank, Limited, 41 Lothbury, in the said City of London, as the holders of the bonds so selected or designated for redemption may elect, of the bonds so selected or designated for redemption, with the unpaid coupons thereto attached; and unless default shall be made by the Company in such payment, upon presentation of the bonds so selected or designated for redemption, all interest thereon shall cease to accrue after the date of such redemption designated in the said notice, and the coupons thereto appertaining for interest subsequent to the said date shall become and be void.

Section Three. If the holder of any bond issued hereunder and outstanding, which shall have been so selected or designated for redemption, shall fail to present the same for payment or surrender as aforesaid, on the date fixed and designated for such redemption, or if the holder of any bond issued hereunder and outstanding which shall not have been so selected or designated for such redemption prior to the maturity thereof, shall fail to present the same for payment or surrender when the same shall be due and payable, according to the terms thereof, or if the holder of any coupon shall fail to present the same for payment or surrender when the same shall be due and payable, according to the terms thereof, then the Company, at its option, may deposit with the Trustee, its successor or successors in the trusts hereby created, to the credit of such bond, or such coupon, as the case may be, designated by the serial number thereof, a sum of money, in gold coin of the United States of America, of or equal to the present standard of weight and fineness, equal to the amount payable on such bond or coupon, and the said deposit shall be full payment of the said bond or coupon, as the case may be, as between the Company and the holder of such bond or coupon; and thereupon and thereafter such bond or coupon, as the case may be, shall be excluded from participation in the lien and security afforded by these presents, and the holder thereof shall look for payment of the said bond or coupon, as the case may be, only to the sum so deposited, and in no event to the Company; and the said sum so deposited shall be held by the Trustee, its successor or successors in the trust hereby created, to the credit and for the payment of the said bond or coupon, as the case may be, and shall be paid by the Trustee, its successor or successors in the trusts hereby created, to the holder thereof upon presentation and surrender to the Trustee, its successor or successors in the trusts hereby created, of the said bond or coupon, as the case may be.

ARTICLE SEVEN.

Sinking Funds.

Section One. The Company hereby covenants and agrees that, on or before the ——— day of ———, A. D. ———, and annually on or before the 1st day of January of each and every year thereafter, until the bonds issued hereunder and outstanding shall have been fully paid or redeemed, it will pay to the Trustee, its successor or successors in the trusts hereby created, as and for a sinking fund for the payment or redemption of the bonds issued hereunder and outstanding, in gold coin of the United States of America, of or equal to the present standard of weight and fineness, a sum of money which shall be at least equal to the quotient obtained by dividing the aggregate amount, par value, of the principal of the bonds which shall be issued and outstanding at the time of such payment, by the total number of years which shall then remain before the said bonds shall mature according to the terms thereof, plus an additional ten (10) per cent. of such quotient.

Section Two. The Company hereby further covenants and agrees that, until the bonds issued hereunder and outstanding shall have been fully paid or redeemed, one-half of the gross proceeds paid by the Company, to the Trustee, its successor or successors in the trusts hereby created, from the sales of any of the real property belonging to the Company, made under the provisions of Article Five hereof, shall be applied by the Trustee, its successor or successors in the trusts hereby created, when the same shall have been paid to it or them, to and become a part of the sinking funds, as hereinafter provided. If the said one-half of the said gross proceeds shall be less than the estimated cost of the said real property sold, including the estimated cost of improvements thereon and thereof, the proportion of the said gross proceeds shall be increased, so far as the same are possible, up to the said estimated cost of the said real property sold. The said proportion of the said gross proceeds shall be applied by the Trustee, its successor or successors in the trusts hereby created, to the sinking fund for the payment or redemption of the bonds issued hereunder and outstanding and to the sinking fund for the payment or redemption of any bonds issued and outstanding under any subsequent or subordinate mortgage or deed of trust which may be executed by the Company to the Trustee, its successor or successors in the trusts hereby created, in the proportion which the amount, par value, of the said bonds issued hereunder and outstanding shall bear to the amount, par value, of any bonds

issued and outstanding under such subsequent or subordinate mortgage or deed of trust. In the event that a trustee or trustees, other than the Trustee, its successor or successors in the trusts hereby created, shall be named as the trustee or trustees, in and of such subsequent or subordinate mortgage or deed of trust, then the Trustee, its successor or successors in the trusts hereby created, shall pay, from time to time, when and as the same shall be received by it or them, to such other trustee or trustees, as and for the sinking fund for the payment or redemption of the bonds issued and outstanding under such subsequent or subordinate mortgage or deed of trust, such portion of the said gross proceeds as shall be applicable to the said sinking fund for the payment or redemption of the bonds issued and outstanding under such subsequent or subordinate mortgage or deed of trust.

Section Three. All moneys which shall be paid to the Trustee, its successor or successors in the trusts hereby created, as and for the purposes of the sinking fund hereunder, or which shall be applied by the Trustee, its successor or successors in the trusts hereby created, to and become a part thereof, as hereinabove provided, for the payment or redemption of the bonds issued hereunder and outstanding, together with any interest thereon, or income thereof, shall be used only for the purpose of payment or redemption of the bonds issued hereunder and outstanding, as hereinafter provided.

Section Four. Immediately upon the payment to, or the application by, the Trustee, its successor or successors in the trusts hereby created, of any moneys as and for the purpose of the sinking fund hereunder, as hereinabove provided, for the payment or redemption of the bonds issued hereunder and outstanding, the Trustee, its successor or successors in the trusts hereby created, shall purchase in the open market, at the then lowest market price thereof, as many of the bonds issued hereunder and outstanding, as can be purchased with such moneys. If none of the bonds issued hereunder and outstanding or the required number thereof, can be so purchased, or so purchased at prices satisfactory to the Trustee, its succeccor or successors in the trusts hereby created, and to the Company, the Trustee, its successor or successors in the trusts hereby created, at the expense of the Company, shall publish a notice at least once a week for at least four (4) successive weeks prior to the date of such redemption, in a newspaper of general circulation published in the said City and County of San Francisco, and also in a newspaper of general circulation published in the said City of New York, and also in a newspaper of general circulation published in the said City of

London, inviting offers in writing for the sale to the Trustee, its successor or successors in the trusts hereby created, of the required number of the bonds issued hereunder and outstanding, and upon receipt of the said offers, the lowest offers shall be accepted, and the said bonds purchased to that extent; provided, however, that in no event shall any of the said bonds be so purchased in the open market, nor shall any offer therefor be so accepted, at a price in excess of the principal of the said bonds and the accrued interest thereon, and a premium of ten (10) per cent. of the said principal.

Section Five. If none of the said bonds issued hereunder and outstanding, or the required number of the said bonds, can be purchased in the open market, or on offers thereof, as aforesaid, and at the prices aforesaid, then the moneys in the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding, to the extent thereof, shall be available to the Company, and upon its order or orders therefor in writing, executed in the name of the Company, by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, under its corporate seal, together with a copy or copies of the resolution or resolutions of the Board of Directors of the Company, duly certified by its Secretary or Assistant Secretary, under its corporate seal, authorizing the execution of such order or orders, shall be applied by the Trustee, its successor or successors in the trusts hereby created, to the payment or redemption of the bonds issued hereunder and outstanding, in the manner hereinabove, in Article Six hereof, provided.

Section Six. Any surplus at any time remaining in the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder, after the purchase payment or redemption aforesaid, shall be used, from time to time, for the further purchase, payment or redemption of the bonds issued hereunder and then outstanding.

Section Seven. The Company, instead of making any prescribed payment in money to the Trustee, its successor or successors in the trusts hereby created, as hereinabove provided, as and for the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding, at its option, may purchase any of the bonds issued hereunder and outstanding, and deliver the same to the Trustee, its successor or successors in the trusts hereby created, and the said bonds so delivered shall be accepted at par by the Trustee, its successor or successors in the trusts hereby created, as a payment *pro tanto*

on account of the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding.

Section Eight. All of the said bonds issued hereunder which shall be purchased with the moneys of the said sinking fund hereunder, or which shall be delivered by the Company to the Trustee, its successor or successors in the trusts hereby created, on account of the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding, together with the coupons thereto attached, shall be stamped by the Trustee, its successor or successors in the trusts hereby created, as no longer negotiable and as belonging to the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding, but such bonds nevertheless shall be deemed to be outstanding under this mortgage or deed of trust for the purposes of the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding, and shall continue to bear interest, and the Trustee, its successor or successors in the trusts hereby created, shall collect and receive such interest and shall add the same when so collected and received, to the said sinking fund hereunder for the payment or redemption of the bonds issued hereunder and outstanding.

ARTICLE EIGHT.

Consolidation, Merger and Transfer of Property as Entirety.

Section One. Nothing contained in this mortgage or deed of trust, or in any of the bonds issued hereunder, shall prevent any consolidation or merger of the Company with another corporation, or any conveyance, assignment and transfer of all the property hereby conveyed, assigned and transferred, as an entirety, to any corporation lawfully entitled to acquire the same; provided, however, that such consolidation, merger or conveyance, assignment and transfer shall not impair the lien and security of this mortgage or deed of trust, or any of the rights or powers of the Trustee, its successor or successors in the trusts hereby created, or of the holders of any of the bonds issued hereunder; and provided, further, that upon such consolidation, merger, or conveyance, assignment and transfer, the due and punctual payment of the principal and interest of all the bonds issued hereunder and then outstanding, according to their tenor and effect, and according to the terms and provisions hereof, and the due and punctual performance and observance of all the covenants and agreements herein contained, on the part of the Company to be kept and performed, shall be assumed by the corporation formed by such con-

solidation or into which the Company shall be merged, or by the corporation to which such conveyance, assignment and transfer shall have been made, as the case may be.

Section Two. In case the Company shall be consolidated or merged, or shall convey, assign and transfer all the property hereby conveyed, assigned and transferred, as an entirety, as aforesaid, the corporation formed by such consolidation, or into which the Company shall be merged, or the corporation to which such conveyance, assignment and transfer shall have been made, as the case may be, upon executing and causing to be recorded, an indenture with the Trustee, its successor or successors in the trusts hereby created, satisfactory to it or them, whereby such corporation shall assume the due and punctual payment of the principal and interest of all the bonds issued hereunder and then outstanding, according to their tenor and effect, and according to the terms and provisions hereof, and the due and punctual performance and observance of all the covenants and agreements herein contained, on the part of the Company to be kept and performed, shall thereupon succeed to and be substituted for the Company, the party of the first part hereto, with the same effect as if it had been named herein as such party of the first part, and shall possess, and, from time to time, may exercise, each and every right and power of the Company hereunder, in its name or otherwise, and it thereupon may cause to be executed and issued, from time to time, either in its own name, or in the name of the Company, any or all of the said bonds which shall not theretofore have been executed by the Company, and the same shall be certified and delivered, upon its order or orders, by the Trustee, its successor or successors in the trusts hereby created, in the same manner and subject to the same terms, conditions and restrictions as hereinabove prescribed, and all bonds so issued shall have the same legal rank and security as the bonds which theretofore may have been issued in accordance with the terms and provisions hereof.

ARTICLE NINE.

Concerning the Trustee.

Section One. The Trustee, its successor or successors in the trusts hereby created, shall be entitled to a reasonable compensation for all services rendered by it or them in the execution of the trusts hereby created, which compensation, as well as all reasonable expenses, costs and charges necessarily incurred and actually disbursed by it or them hereunder, shall be secured by these presents and be a first lien, prior to any other lien, here-

under, and the Company hereby covenants and agrees to pay the same on demand.

Section Two. The Trustee, its successor or successors in the trusts hereby created, shall not be answerable for the default or misconduct of any agent, servant or attorney appointed by it or them in pursuance hereof, if such agent, servant or attorney shall have been selected with reasonable care. nor for anything whatsoever in connection with the trusts hereby created, except its or their misconduct or negligence; nor shall the Trustee, its successor or successors in the trusts hereby created, be answerable for the default or misconduct of any co-trustee or co-trustees appointed hereunder.

Section Three. The Trustee, its successor or successors in the trusts hereby created, shall not be personally liable for any debts contracted or obligations incurred by it or them, or for nonfulfillment of contracts, or for damages for injuries to persons or property, or for damages for the death of any person, or for salaries, during any period wherein the Trustee, its successor of successors in the trusts hereby created, shall manage or be in possession of the property hereby conveyed, assigned and transferred, as aforesaid.

Section Four. All recitals, statements and representations of fact herein and in the said bonds issued hereunder contained are made for and on behalf of the Company, and the Trustee, its successor or successors in the trusts hereby created, assume no responsibility as to the correctness of any such recital, statement or representation, or as to the validity of this mortgage or deed of trust, or the bonds issued hereunder, or as to the amount or extent of the security afforded by the property hereby conveyed, assigned and transferred, or for the breach of any of the covenants or agreements hereof by the Company, or as to the application of any of the bonds certified and delivered hereunder, or of the proceeds of any of them, for any of the purposes herein expressed, or for the use or disposition of the said bonds, or the proceeds thereof, or for any other act or thing done herein, except through its or their own misconduct or negligence.

Section Five. The Trustee, its successor or successors in the trusts hereby created, shall be under no obligation to recognize any person, firm or corporation as the holder of any of the bonds issued hereunder, or to do or refrain from doing any act pursuant to the request or demand of any person, firm or corporation, professing or claiming to be such holder, until such holder shall

produce the bond or bonds which he or it professes or claims to hold, and deposits the same with the Trustee, its successor or successors in the trusts hereby created, and indemnifies the Trustee, its successor or successors in the trusts hereby created, to its or their full satisfaction, for any and all expenses, costs, charges, counsel fees and other reasonable disbursements for which it or they may become liable or responsible in proceeding to carry out such request or demand.

Section Six. Should any suit or proceeding be brought against the Trustee, its successor or successors in the trusts hereby created, or by reason of it or their such Trustee or Trustees, it or they shall be under no obligation to enter an appearance by counsel, or in any way to appear in or defend such suit or other proceeding, unless indemnified to its or their full satisfaction for so doing, but it or they may nevertheless appear and defend such suit or proceeding without indemnity if it or they elect so to do, and in such case it or they shall be compensated therefor from the trust funds in its or their hands, or if there are no such trust funds in its or their hands, it or they shall be paid or compensated by the Company on demand.

Section Seven. The Trustee, its successor or successors in the trusts hereby created, shall not be responsible for the recording of this mortgage or deed of trust, or filing the same for record, but the Company hereby covenants and agrees to cause the same to be duly and properly filed for record and recorded with all convenient speed.

Section Eight. The Trustee, its successor or successors in the trusts hereby created, shall be under no duty or obligation to pay, or keep itself informed as to the payment of, any taxes, assessments or other charges upon the property, or any part thereof, hereby conveyed, assigned and transferred, or which shall or may now or hereafter be lawfully imposed upon this mortgage or deed of trust.

Section Nine. The Trustee, its successor or successors in the trusts hereby created, shall be under no duty or obligation to effect any insurance against loss or damage by fire or other peril upon any portion of the property hereby conveyed, assigned and transferred, or to renew any policies of insurance thereon.

Section Ten. The Trustee, its successor or successors in the trusts hereby created, shall be under no duty or obligation to see to the delivery to it or them of the bonds or certificates for shares

of the capital stock of other corporations, or other securities, assigned and transferred, or agreed to be assigned or transferred, hereunder, or to see that any of the property, real or personal, assigned, transferred and conveyed, or agreed to be assigned, transferred and conveyed, hereunder, is properly or legally subject to the lien hereof, or to give notice of its or their rights or interests hereunder, or of the execution of this mortgage or deed of trust, to any of the holders of any of the bonds or certificates for shares of the capital stock of other corporations, or other securities, assigned and transferred, or agreed to be assigned and transferred, hereunder, or to any other person or corporation; and the Trustee, its successor or successors in the trusts hereby created, is, and they are, hereby authorized to accept for assignment and deposit hereunder, as herein provided, instruments on their face purporting to be the bonds or certificates for shares of the capital stock of other corporations, or other securities, assigned and transferred, or agreed to be assigned and transferred, hereunder.

Section Eleven. The Trustee, its successor or successors in the trusts hereby created, shall be protected and held harmless in acting upon any notice, request, consent, certificate, bond or other instrument or paper provided for in this mortgage or deed of trust, believed by it or them to be genuine and to have been signed of executed by the proper party or parties, and shall be entitled to receive the same, in its or their discretion, as conclusive proof of any fact or matter therein contained, upon which, or by reason of which the Trustee, its successor or successors in the trusts hereby created, may be required to act, or in its or their discretion, may act. If and in case at any time it shall be necessary or proper that the Trustee, its successor or successors in the trusts hereby created, make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing anything under this mortgage or deed of trust as such Trustee, in respect to which this mortgage or deed of trust does not make specific provision for the evidence upon which the Trustee, its successor or successors in the trusts hereby created, may act or not act, the certificate of the Company, under its corporate seal, executed in the name and on behalf of the Company by its President or one of its Vice Presidents, and by its Secretary or Assistant Secretary, shall be conclusive evidence of such fact or facts and shall protect the Trustee, its successor or successors in the trusts hereby created.

Section Twelve. The Trustee, or any successor or successors thereof in the trusts hereby created hereafter appointed, may

resign as such Trustee or Trustees, at any time, by an instrument duly executed and acknowledged, so as to entitle the same to be recorded, and delivered to the President or to one of the Vice Presidents of the Company, and after thirty (30) days from the time such resignation shall have been so delivered as aforesaid, the same shall be deemed to me and shall be complete and effectual, and such Trustee or Trustees shall thereupon be released of and from all responsibility and liability of every kind and nature created or imposed by virtue of these presents.

Section Thirteen. The Trustee, or any successor or successors thereof in the trusts hereby created hereafter appointed, may be removed, at any time, by an instrument or concurrent instruments or counterparts in writing, signed and duly acknowledged in the manner hereinabove provided, by the holders of a majority in amount of the principal of the bonds issued hereunder and then outstanding, or by their attorneys in fact duly appointed.

Section Fourteen. In case the Trustee, or any successor or successors thereof in the trusts hereby created hereafter appointed, shall at any time resign or be removed, or otherwise become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the principal of the bonds issued hereunder and then outstanding, by an instrument or concurrent instruments or counterparts in writing, signed and duly acknowledged, in the manner hereinabove provided, by the holders of a majority in amount of the principal of the bonds issued hereunder and then outstanding, or by their attorneys in fact duly appointed; provided, nevertheless, that in case, at any time there shall be a vacancy in the office of the Trustee hereunder, the Company, by an instrument executed by order of its Board of Directors, may appoint a Trustee to fill such vacancy until a new Trustee shall be appointed by the holders of a majority in amount of the principal of the bonds issued hereunder and then outstanding, as hereinabove provided, but any new Trustee so appointed by the Company shall immedately and without further act be superseded by a Trustee appointed by the holders of a majority in amount of the principal of the bonds issued hereunder and then outstanding, as aforesaid. Any such new Trustee appointed hereunder shall execute, acknowledge and deliver to the Company an instrument accepting such appointment hereunder, and thereupon such new Trustee, without any further deed, act or conveyance, shall become vested with all the estate, properties, right, powers, obligations and trusts, with like effect as if originally named Trustee herein, but the Trustee retiring, upon the written demand of the new Trustee shall make, execute, acknowledge and deliver an instrument conveying, assigning and

transferring to such new Trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, obligations and trusts of the Trustee so retiring, and shall duly assign, transfer and deliver to the new Trustee, so appointed in its place, all properties and moneys held by it under the trusts hereby created. Should any deed, conveyance, assignment or other instrument from the Company be required by any new Trustee for more fully and certainly vesting in or confirming to it the said estates, properties, rights, powers, obligations and trusts, then any and all such deeds, conveyances, assignments and instruments, on request of such new Trustee, shall be made, executed, acknowledged and delivered by the Company and the same properly recorded by the Company.

And this Indenture Further Witnesseth:

That the said C. D. Trust Company of San Francisco hereby accepts the trusts in this mortgage or deed of trust declared and provided, and agrees to perform the same upon the conditions hereinabove expressed.

In order to facilitate the recording of this mortgage or deed of trust, the same may be simultaneously executed in seven (7) counterparts. Each such counterpart shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.

In witness whereof, the said A. B. Company of California, the said party of the first part, has hereunto caused its corporate name to be signed and its corporate seal to be affixed, by its President and its Secretary, thereunto respectively duly authorized, and the said C. D. Trust Company of San Francisco, the said party of the second part, and the Trustee herein, to evidence its acceptance of the trusts hereby created, has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its Vice President and its Secretary, thereunto respectively duly authorized.

(Corporate Seal.) A. B. COMPANY OF CALIFORNIA,
By WILLIAM BLACK,
President,
By HENRY BROWN,
Secretary.

(Corporate Seal.) C. D. TRUST COMPANY OF SAN FRANCISCO,
By RICHARD GREEN,
Vice President,
By ARTHUR BLUE,
Secretary.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

On the 15th day of November, in the year One Thousand Nine Hundred and Ten, before me, Thomas Gray, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared William Black and Henry Brown, known to me to be the President and the Secretary, respectively, of A. B. Company of California, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal to this certificate, the day and year first above written.

(Notarial Seal.) THOMAS GRAY,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

On the 15th day of November, in the year One Thousand Nine Hundred and Ten, before me, Thomas Gray, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Richard Green and Arthur Blue, known to me to be the Vice President and the Secretady, respectively, of C. D. Trust Company of San Francisco, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal to this certificate, the day and year first above written.

(Notarial Seal.) THOMAS GRAY,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

William Black, being duly sworn, deposes and says: That he is an officer, to wit, the President of A. B. Company of California, one of the corporations named in and which executed the foregoing mortgage or deed of trust; and that the said mortgage or deed of trust was and is made in good faith and without any design to hinder, delay or defraud creditors.

WILLIAM BLACK.

Subscribed and sworn to before me this 15th day of November, A. D. 1910.

(Notarial Seal.) THOMAS GRAY,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

Henry Brown, being first duly sworn, deposes and says: That he is an officer, to wit, the Secretary of A. B. Company of California, one of the corporations named in and which executed the foregoing mortgage or deed of trust; and that the said mortgage or deed of trust was and is made in good faith and without any design to hinder, delay or defraud creditors.

Affiant further deposes and says: That he is a resident of the County of Los Angeles, State of California; that he is and was the Secretary of the said A. B. Company of California at the date of the execution of the said mortgage or deed of trust; that he knows the corporate seal of the said corporation; that he is and was the legal custodian of the said seal at the date of the execution of the said mortgage or deed of trust; that the said seal affixed to the said mortgage or deed of trust was and is such corporate seal; that the said seal was by him so affixed by order of the Board of Directors of the said corporation; and that he subscribed his name to the said mortgage or deed of trust as the Secretary of the said mortgage or deed of trust as the Secretary of the said corporation by a like order of the said Board of Directors.

Affiant further deposes and says: That he was and is acquainted with William Black, and his handwriting, and knows that the said William Black is and was the President of the said A. B. Company of California or deed of trust, and that the signature of the said Wiliam Black, subscribed to the said mortgage or deed of trust, is the genuine handwriting of the said William Black, and was thereto by the said William Black, subscribed by a like order of the said Board of Directors and in the presence of affiant.

HENRY BROWN.

Subscribed and sworn to before me this 15th day of November, A. D. 1910.

(Notarial Seal.) THOMAS GRAY,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

Richard Green, being first duly sworn, deposes and says: That he is an officer, to wit, the Vice President of C. D. Trust Company of San Francisco, one of the corporations named in and which executed the foregoing mortgage or deed of trust; and that the said mortgage or deed of trust was and is made in good faith and without any design to hinder, delay or defraud creditors.

RICHARD GREEN.

Subscribed and sworn to before me this 15th day of November, A. D. 1910.

(Notarial Seal.) THOMAS GRAY,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

Arthur Blue, being first duly sworn, deposes and says: That he is an officer, to-wit, the Secretary of C. D. Trust Company of San Francisco, one of the corporations named in and which executed the foregoing mortgage or deed of trust; and that the said mortgage or deed of trust was and is made in good faith and without any design to hinder, delay or defraud creditors.

ARTHUR BLUE.

Subscribed and sworn to before me this 15th day of November, A. D. 1910.

(Notarial Seal.) THOMAS GRAY,
Notary Public in and for the City and County of San Francisco. State of California.

Form 380.

Trust Deed by Street Railroad Company to Secure Bonded Indebtedness—Law, Franchises, Etc.

This Indenture, made this ——— day of ———, in the year A. D. ———, by and between the A. B. Railroad Company, a corporation duly incorporated under the laws of the State of ———, party of the first part, hereinafter called "Railroads Company," and the ——— Trust Company of San Francisco, a corporation

duly incorporated under the laws of the State of California, Trustee for the uses and purposes, and upon the terms and conditions hereinafter stated, party of the second part, hereinafter called "Trustee," *Witnesseth*:

Whereas, "Railroads Company" has been incorporated with an authorized capital stock of ——— divided into ——— shares of the par value of $100 each, of which ——— shares are Four Per Cent. Cumulative Preferred Stock, preferred as to dividends and capital, and ——— shares are Common Stock, all which Capital Stock has been duly issued as full paid and is now outstanding; and

Whereas, "Railroads Company," party of the first part, being fully and expressly thereunto authorized by the laws of the State of California, has acquired by purchase the following shares of stock in certain street railway companies operating railroads in the City and County of San Francisco, in the said State of California, to wit: (*Description.*)

and as well contemplates the acquisition of the remaining shares of the capital stock of the said ——— Street Railway Company, amounting to ——— shares, and of the remaining shares of the capital stock of the ——— Street Railway Company, amounting to ——— shares; and of the remaining shares of the capital stock of the ——— Railroad Company, amounting to ——— shares, all of which remaining shares, from time to time as acquired, shall fall into and form part of the property and estate conveyed by this indenture; and,

Whereas, in part consideration for the purchase of said shares of capital stocks so acquired and to be acquired, "Railroads Company" has agreed to pay the sum of ——— Dollars (———) in its First General Mortgage Four Per Cent. Gold Bonds, said Bonds being taken at their full par value; and,

Whereas, since the purchase of said stocks as aforesaid, "Railroads Company" under and in pursuance of the laws of the State of California, has acquired all of the properties, rights, franchises and privileges of the several street railway companies aforesaid, to wit: ...., such acquisitions being subject, however, to the outstanding bonded indebtednesses of certain of said companies, and underlying liens upon certain of the properties thereof, as hereinafter more particularly described: and,

Whereas, "Railroads Company" desires to make provision now for the purchase, retirement, or exchange of the mortgage debts of certain of the street railway companies aforesaid, and the underlying liens upon certain of their properties, whose property or whose capital stocks have been acquired by "Railroads Company" as aforesaid, and which mortgage debts and underlying liens are as follows: (*Description.*)

The said mortgage debts and underlying liens aggregating the sum of ....., of which the sum of ..... will be discharged by the operation of sinking funds under the provisions of certain of said mortgages, leaving remaining mortgage debts and underlying liens as aforesaid to the amount of ..... for the purchase, retirement or exchange of which "Railroads Company" desires now to make provision; and,

Whereas, "Railroads Company" desires to make provision for such betterments, improvements, extensions, purchase and acquisitions of railroads and other properties within the purposes of the corporation as in the conduct of its business may be deemed wise and necessary by its Board of Directors; and,

Whereas, the stockholders of "Railroads Company" did, at a meeting duly convened on ——— day of ——— A. D. ———, in accordance with all the provisions of law applicable thereto, and at which all of the stockholders of said Company were present in person or by proxy, vote unanimously to create a bonded indebtedness of said Company, as herein provided, to the amount of ....., for the several purposes aforesaid, and to issue ..... par value of Four Per Cent. Sinking Fund Gold Bonds of said Company, and to secure the same by a First General Deed of Trust of all the property, real, personal and mixed, including all rights, franchises and privileges of whatever nature and kind now owned and possessed and which might be hereafter acquired by "Railroads Company," and to that end unanimously adopt certain resolutions in words and figures following, to wit:

"Whereas, in order to pay or otherwise provide at maturity
"for the existing bonds issued at various times on certain of the
"railways whose property or stock has been acquired by this
"Company, or to sooner retire or acquire the same by purchase
"or exchange through the sale or exchange of the bonds now

"proposed to be created and reserved for such purpose, and in "order to make suitable provision for the equipment of its rail- "ways and for renewals of tracks and other permanent improve- "ments, and for the conversion of its motive power into electric, "cable or otherwise, and for betterments, and for additional ex- "tensions of its railways, and for the acquisition of such addi- "tional stocks and property as may be required from time to "time, in the discretion of its Board of Directors, and as well in "payment for the following shares of stock heretofore pur- "chased by this Company, viz.; (*Description.*)

"and the remaining shares of stock of said ——— Street Rail- "way Companies and of the ——— Railroad Company as may "be hereafter acquired; therefore,

"*Resolved,* that this Company make and issue its Four Per "Cent. Sinking Fund Gold Bonds, payable to bearer, or the "registered holder thereof, for the aggregate sum of ..... "..... which bonds shall "bear date ———, and be of the denomination of one thousand "dollars ($1,000) each, payable in Gold Coin of the United "States of Amercia of or equal to the present standard of weight "and fineness, on the first day of April, ———, with provision "for payment of taxes if any, and shall be numbered consecu- "tively from one to ..... "....., both inclusive, and shall bear interest "from the first day of April, ———, at the rate of four per cent. "per annum, payable in like Gold Coin semi-annually, on the "first days of April and October in each year, as evidenced by "coupons to be thereto attached; and, further

"*Resolved,* that for the purpose of securing the payment of "the said bonds and the interest which shall accrue thereon, this "company shall make, execute and deliver unto the ——— Trust "Company of San Francisco, trustee, a deed of trust of all and "singular the railways of this company constructed, now owned "or hereafter acquired, together with all branch lines and all "electrical machinery, power houses, equipments, tolls and in- "come thereof, all corporate rights and franchises of this com- "pany and all its real and personal property wherever situate, "now owned or hereafter to be acquired, and particularly all "stocks owned by this company, or which may be hereafter ac- "quired, in any company owning or operating a line or lines of "street railway in the City and County of San Francisco, in the "State of California, which deed shall be in trust for the benefit "and security of the holders of said bonds to the extent afore-

"said, without preference, priority or distinction as to lien or "otherwise, so that each bond so issued shall have the same right "of lien and privilege and security thereunder, as though they "had been all executed and delivered simultaneously with the "execution of said deed; and, further,

"*Resolved,* that the President and Secretary or other proper "officers of this company be and they are hereby authorized and "empowered for and on behalf of this company to affix its cor- "porate seal to each of said bonds and sign the same as such offi- cer, and when so executed to deliver the same to the said trustee. "In the execution of the coupons attached to said bonds, the sig- "nature of the Treasurer of this Company, or other proper offi- "cer, engraved thereon, shall be regarded and treated in all re- "spects in law and in fact equivalent to the manual signing "thereof. The bonds so to be issued, the coupons to be thereto "attached and the trustee's certificate to be endorsed thereon "shall be in the following forms, to wit:

'UNITED STATES AF AMERICA.

'STATE OF CALIFORNIA.

'Four Per Cent. Sinking Fund Gold Bond secured by First General Deed of Trust.

'No. $1,000

'Know all men by these presents, That the A. B. Company, a 'corporation existing under the laws of the State of California, 'is indebted to and promises to pay to the bearer hereof, or, if 'registered, to the registered holder hereof, the sum of One Thou- 'sand Dollars, in Gold Coin of the United States of America, of 'or equal to the present standard of weight and fineness, on the 'first day of April, A. D. ———, at its office or agency in the City 'of San Francisco, State of California, or in the City of New 'York, State of New York, at holder's option, with interest 'thereon payable in like Gold Coin from the first day of April, 'A. D. ———, at the rate of four per cent. per annum, payable 'semi-annually, at its office or agency, as aforesaid, in the City of 'San Francisco or City of New York, at holder's option, on the 'first days of April and October of each and every year and 'until this bond shall be fully paid, upon presentation and sur- 'render of the annexed coupons as they severally become due, 'without deduction of any tax or taxes on account thereof, or on 'account of the principal, which under any present or future laws

'of the United States of America or of the State of California, 'the said A. B. Railroad Company may be required to pay or re- 'tain therefrom, for national, state or municipal purposes.

'This bond is one of a series of ..... '..... bonds of like date and tenor 'numbered consecutively from one (1) to ..... '..... both inclusive, each for 'the sum of one thousand dollars, the full and final payment of each and every of which bonds, amounting in the aggregate 'to the sum of ..... '..... is secured by a certain First General 'Deed of Trust, bearing date the ——— day of ——— ———, 'from the said A. B. Railroad Company to the ——— Trust 'Company of San Francisco, as trustee, duly executed and re- 'corded in the office of the county recorder of the City and 'County of San Francisco, State of California, of the entire 'works and appurtenances, property, real and personal, rights 'and franchises of the said A. B. Railroad Company, as by refer- 'ence to said Indenture will more fully and at large appear, and 'subject to all the terms, limitations and conditions of which this 'bond is issued.

'This bond to be valid only when authenticated by the certi- 'ficate hereon of the said ——— Trust Company of San Fran- 'cisco, as Trustee.

'This bond shall pass by delivery, unless registered in the 'name of the owner hereof, on books kept for that purpose, by 'the A. B. Railroad Company, and after such registration of 'ownership, duly certified hereon, no transfer hereof shall be 'valid except upon the said books kept by the said A. B. Railroad 'Company, by the registered owner hereof, in person or by his 'attorney, duly authorized thereto, unless the last registration 'shall have been to bearer, and this bond shall continue subject 'to succesisve registration in the name of the owner and to 'bearer, at the option of the holder.

'In Witness Whereof, the said A. B. Railroad Company has 'caused its corporate seal to be hereto affixed, and these presents 'to be attested by its President and Secretary, or other proper 'officers, this ——— day of ——— A. D. ———.

A. B. RAILRAOD COMPANY

'By .....

'President.

'.....

Secretary.'

"(Last Coupon.)

'$20.00 No. .....

'A. B. Railroad Company will pay to bearer at its office or 'agency in the City of San Francisco or City of New York, at 'holder's option, on the first day of ———, A. D. ———, Twenty 'Dollars ($20.00) in Gold Coin, being six months' interest on its 'Four Per Cent. Sinking Fund Gold Bond No. .....

.....

'Treasurer.'

"(Trustee's Certificate.)

'The ——— Trust Company of San Francisco, Trustee, 'hereby certifies that this bond is one of a series of ..... '..... bonds mentioned 'herein, and in the said Indenture given to secure the same.

——— TRUST COMPANY,

'Trustee.

'By .....

'Secretary.'"

And, Whereas, at a meeting of the said Board of Directors of "Railroads Company" duly called in conformity with law, at its office in the City of San Francisco, State of California, on the ——— day of ———, ———, and held before the adjournment of the stockholders' meeting above referred to, at which Directors' meeting each and every member of said board was present, the President of the Company submitted to the Board the action taken by the stockholders at their meeting aforesaid then in progress, in authorizing the issue of bonds and execution of a deed of trust as authorized in the resolutions aforesaid adopted by said stockholders, and also then and there submitted this form of indenture to be executed in conformity with the resolutions aforesaid, adopted by said stockholders. Whereupon the following resolution was by unanimous concurrence adopted by the Board, to wit:

"*Resolved,* that in pursuance of the consent and direction "given by the stockholders of this company at their meeting duly "called and held this day, the Board of Directors hereby au- "thorizes and directs the issue of Four Per Cent. Sinking Fund "Gold Bonds of this company to the amount of .....

"

"par value in the form this day authorized by the stockholders of "the company; and further authorizes and directs that the form "of deed of trust now submitted by the President be forthwith

"submitted for their approval to the stockholders of the com-
"pany at their meeting now in session, and that upon the same
"being so approved this Board empowers and directs the Pres-
"ident and Secretary, or other proper officers of this Company,
"to duly sign and execute the said bonds and deed of trust and
"to affix thereto the corporate seal of this Company, and to duly
"acknowledge said indenture so as to entitle it to be recorded as
"binding and operative on real as well as personal property in
"pursuance of the laws of the State of California, and to deliver
"the same to the ——— Trust Company of San Francisco as
"Trustee."

And thereafter, and while the said meeting of stockholders was in progress, the President of the company having then and there read and submitted to the stockholders the form of this Indenture, and the same having been entered on the minutes of said stockholders' meeting, the following resolution was thereupon unanimously adopted by said stockholders, to wit:

"*Resolved,* that the form of deed of trust submitted by the
"President to this meeting and entered upon the minutes thereof,
"and which has been approved by the Board of Directors of this
"company at a meeting of said Board, duly held this day, be and
"the same is hereby approved, and that said indenture be made
"and executed by this company under its corporate name, sub-
"scribed by its President, and with its corporate seal thereto
"affixed, attested by its Secretary, and when so executed that it
"be duly acknowledged so as to entitle it to record in pursuance
"of the laws of the State of California, and when so acknowl-
"edged it shall be duly recorded, and that the Directors of this
"company and the said President, Secretary and other proper
"officers of this company are authorized to do and cause to be
"done all acts necessary, proper or expedient to carry into ef-
"fect the objects and purposes expressed in the resolutions
"adopted by the stockholders at this meeting, and to perfect the
"said issue of bonds and the deed of trust to secure the same,"
and,

Whereas, said Board of Directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further direct that a Sinking Fund should be created for the redemption and payment of said bonds on or before their maturity, as follows, to wit:

That, commencing with the year ———, and on the first day of January of that year, and on the first day of January in each

year thereafter, until all of said bonds, principal and interest, shall have been redeemed or paid, there shall be set apart a sum not less than two per cent. (2%) of the gross earnings of said "Railroads Company" during the year then next preceeding, but in no event to be less than the sum of one hundred thousand dollars ($100,000).

The said sums so set apart shall, within sixty days thereafter, be deposited with Trustee as a Sinking Fund to be used in the redemption of said bonds issued hereunder under the instructions of the Board of Directors. To this end, notice shall be published in one daily paper in the city of San Francisco, and one daily paper in the city of New York, for such length of time as the Board of Directors may order, that bonds will be purchased therewith, and inviting bids for the surrender thereof at prices to be named by the bidders, and upon reception of said bids the lowest bids shall be accepted and bonds purchased to the extent of the money in the Sinking Fund, and all bonds so purchased shall be forthwith canceled and remain in the custody of the Trustee; provided, however, that the Board of Directors may, in their discretion, from time to time, direct the investment of said Sinking Fund in the bonds of "Railroads Company" at their par value or under, without inviting bids, or in the purchase of Bonds secured by Mortgages now existing upon the properties acquired by "Railroads Company," and conveyed by this Deed of Trust, to such extent as the same may at the time be redeemable upon the terms fixed for such redemption, the same to be held by Trustee as a Sinking Fund investment or canceled as the Board of Directors shall order and determine; and

Whereas, a certificate in respect to the creation of the bonded indebtedness of "Railroads Company" has been duly filed, as required by law, in the office of the County Clerk of the county where the original articles of incorporation of said "Railroads Company" are filed, and a certified copy thereof filed in the office of the Secretary of State of the State of California; and

Whereas, in pursuance of said resolutions, and of all and every legal power and authority in it vested, "Railroads Company" proposes now to make and execute, and, as herein provided, to issue and deliver the bonds hereby secured, and in this Indenture to declare the terms and conditions upon which every such bond is and shall be issued and secured.

Now, Therefore, This Indenture Witnesseth:

That in order to secure the payment of the principal and inter-

est of all such bonds at any time issued and outstanding under this Indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which said bonds are issued and received, "Railroads Company," party of the first part, in consideration of the purchase and acceptance of such bonds by the holders thereof, and of the sum of One Dollar, to it duly paid by "Trustee," at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents and has granted, bargained, sold, released, conveyed, assigned, transferred and set over, and by these presents does grant, bargain, sell, release, convey, assign, transfer and set over unto "Trustee," party of the second part, its successors and assigns forever:

All and Singular those certain properties, franchises, rights and privileges situate and being in the City and County of San Francisco, State of California, and being all the property, real, personal, and mixed, including all privileges, properties, rights, and franchises, of said party of the first part of whatever kind or nature and wherever situate and more particularly described as follows:

I.

FRANCHISES.

City and County of San Francisco.

Those certain franchises, rights and privileges to construct, lay down, operate and maintain street railroads, over, along and upon the streets, avenues, roads and highways therein named, in the City and County of San Francisco, California, granted to and conferred upon the grantees named therein, their successors and assigns, by orders and resolutions of the Board of Supervisors of said City and County of San Francisco, and amendments thereto, which said orders and resolutions are herein set forth and designated by the numbers thereof and the date of their approval and passage by the said Board of Supervisors of said City and County, all of which appears from the originals of said orders and resolutions and the amendments thereof, now on file in the office of the said Board of Supervisors in the said City and County, which are hereby referred to and made a part hereof as though inserted herein at length, viz.: (*Description.*)

Also that certain franchise, right and privilege to construct, maintain and operate pumps, and machinery to pump salt water, and to lay down pipe or pipes in and through the streets of the City and County of San Francisco for the purpose of conveying said water, granted to the ——— Railway Company, its successors and assigns by an order of the Board of Supervisors of the City and County of San Francisco, numbered .... approved and adopted by said Board on, to wit, ———; and also

All and singular, any and all other franchises, rights and privileges now owned, claimed or possessed, or which may be hereafter acquired by the party of the first part.

II.

ROADS AND ROLLING STOCK.

And also, all and singular every railroad, railroad line, roadway, roadbed, rails, fixtures and appurtenances of the party of the first part, situate in the City and County of San Francisco, State of California, in, along, upon and across the following streets, avenues, roads and highways, to wit: (*Description.*)

INCLUDING all tracks, rails, poles, wires, switches, branches, and turnouts, all rights of way, superstructures, side-tracks or sidings, bridges, all depot buildings, station-houses, shops, warehouses, car houses, engine houses, machine shops, repair shops, buildings, erections, and structures, now owned by the said party of the first part, and the lands of the said party of the first part whereon the same are or may be located; and also,

INCLUDING all and singular the rolling stock, equipments, fixtures, horses, harness, cables, engines, machinery, materials now on hand or contracted for, and all tools and implements of every character and description, appertaining thereto, now owned, claimed, or in the possession of the party of the first part; and also,

ALL the rents, issues, tolls, incomes, earnings, receipts, and profits of such railroads and branches; and also,

ALL the rights, privileges, immunities, or franchises, relating or pertaining to such railroads, or railroad lines or branches, which the party of the first part now possesses, owns, claims, or is entitled to, or may hereafter become possessed of or entitled to; and also,

ALL the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to said franchises, rights, property, premises, and every part and parcel thereof, with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining; and also,

III.

REAL ESTATE.

CITY AND COUNTY OF SAN FRANCISCO.

All those certain lots, pieces or parcels of land situate, lying and being in the City and County of San Francisco, State of California, and more particularly described as follows: (*Description.*)

TOGETHER WITH ALL AND SINGULAR the buildings and improvements in and upon or appurtenant to any and all of said foregoing described land, premises and real estate, together with the contents of all such buildings and improvements, and also

ALL AND SINGULAR the personal property of the party of the first part of whatever kind and nature and wherever situate, and now held or hereafter acquired, including amongst others the shares of capital stock of the ——— Railway Company, the ——— Street Railway Company, the ——— Street Railway Company, and the ——— Railroad Company hereinbefore mentioned, as well as all other stocks, bonds, negotiable instruments, securities and commercial paper, and also all other evidences of ownership or indebtedness of every kind and nature, now or hereafter belonging to said party of the first part, or in which said party of the first part may now or hereafter have or acquire any interest or title whatsoever.

To Have and to Hold the premises, railway property, real or personal, rights, frachises, estate or appurtenances hereby conveyed or assigned unto "Trustee," its successors and assigns forever.

Subject, However, as to certain portions of the said premises hereby conveyed, to the hereinbefore recited existing mortgage bonds, so far as they constitute liens thereon, and subject also to the reservations contained in any deed of conveyance of any of said premises, under which "Railroads Company" have acquired, or hereafter shall acquire, tilte thereto.

But in Trust, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest coupons issued and to be issued hereunder, and secured by this Indenture, and for the enforcement of the payment of said bonds and interest coupons, when payable, and the performance of, and compliance with, the covenants and conditions of this Indenture, without preference, priority or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or negotiation thereof, so that each and every bond issued and to be issued as aforesaid, shall have the same right, lien and privilege under this Indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been made, executed, delivered and negotiated simultaneously with the execution and delivery of this Indenture; it being intended that the lien and security of this Indenture shall take effect from the day of the date hereof without regard to the date of actual issue, sale, or disposition of said bonds, and as though upon the day of such date all of said bonds had been actually issued, sold and delivered to, and were in the hands of, innocent holders for value.

And It Is Hereby Covenanted and Declared that all such bonds, with the coupons for interest thereon, are to be issued, certified and delivered, and that the premises hereby conveyed are to be held by "Trustee," subject to the further covenants, conditions, uses and trusts hereinafter set forth. And it is covenanted between the parties hereto as follows, to-wit:

ARTICLE ONE.

Issue and Appropriation of Bonds.

Section 1. All bonds to be secured hereby shall be executed and delivered by "Railroads Company" to "Trustee" for certification, and thereupon "Trustee" shall certify and deliver the same as provided herein.

Only such bonds as shall bear thereon endorsed the certificate of "Trustee," by it duly executed, shall be secured by this Indenture, or shall be entitled to any lien or benefit hereunder, and every such certificate of "Trustee," upon any bond executed in behalf of "Railroads Company," shall be conclusive evidence that the bond so certified has been duly issued hereunder and is entitled to the benefit of the trusts hereby created. On request of "Railroads Company," certificates for the future delivery of bonds shall be made, and bonds hall be delivered therefor when engraved; and

"Railroads Company" covenants that it will cause this Indenture to be duly recorded with all convenient speed.

Section 2. Of such authorized issue, there shall be reserved bonds to the aggregate principal sum of nine million eight hundred and sixty-six thousand dollars ($9,866,000), or so many thereof as shall be necessary, which shall be executed by "Railroads Company," and shall be from time to time certified by "Trustee," which said bonds are hereby secured and reserved for the acquisition by purchase or exchange, or for the redemption or payment of the above described existing bonds constituting the mortgage debts of certain of the companies, or underlying liens upon the properties of certain of said companies, whose capital stocks or propertiees have been acquired by "Railroads Company," as aforesaid, and said bonds reserved for such purposes shall be issued, certified and delivered from time to time, when authorized by resolution of the Board of Directors of "Railroads Company," only to the amount for which now outstanding bonds of the said ——— Street Railway Company, ——— Street Cable Railway Company, The ——— Cable Company, hereinabove mentioned and referred to, shall have been surrendered, or shall have been agreed to be surrendered, to "Railroads Company" for the purpose of being retired and canceled; the amount of bonds to be so issued to be certified in writing by the President or Vice President and Secretary of "Railroads Company."

Whenever "Railroads Company" shall furnish to "Trustee" a certificate in writing of the President or Vice President and Secretary, which shall certify that "Railroads Company" has need of a certain portion of said reserved bonds to meet any of the said outstanding bonds or underlying liens as aforesaid, when and as the same have been surrendered to, or shall have been agreed to be surrendered to "Railroads Company," or when and as the same shall mature, and that it has need of said reserve bonds for the purpose of selling the same in order to purchase or pay said outstanding bonds or underlying liens, so surrendered or agreed to be surrendered, then and in that event "Trustee" shall certify and deliver to "Railroads Company" an equivalent amount of bonds reserved hereunder, to be by said "Railroads Company" sold for the purpose of furnishing the money necessary for the purchase or payment of said outstanding bonds or underlying liens; and said reserved bonds shall be so certified and delivered at such times anterior to the maturity of said outstanding bonds or underlying liens as may be necessary in the discretion of said Board of Directors of "Railroads Company," for such purchase or payment; *provided, however,* that "Trustee" shall receive the proceeds of any

reserved bonds sold by "Railroads Company" under this clause and apply the same to the purchase or payment of such outstanding bonds or underlying liens.

When and as the said outstanding bonds or underlying liens shall be paid, the same shall be canceled by "Trustee" and the lien and the mortgage, if any, securing the same shall be procured to be released.

Section 3. Of the remainder of such authorized issue, there shall be reserved, bonds to the aggregate principal sum of .... ($.....) for the construction or acquisition of branch lines, extensions, power houses, property appurtenant, or such other additional property, including construction or alterations, necessary upon or along or appurtenant to, or for use in connection with the lines of railway belonging to or which may be acquired by "Railroads Company," which said premises or property shall be and become subject to the lien of this Indenture, at the time of such construction or acquisition, when and as the same shall be acquired; and from the bonds so reserved there shall be certified by "Trustee" and issued to "Railroads Company" such amounts of said bonds as shall be deemed proper by the Board of Directors of "Railroads Company," and such bonds, or any of them, shall be certified and issued by "Trustee" upon a resolution of said Board of Directors that the same are needed for the purposes aforesaid, or any of them, which resolution shall be conclusive upon "Trustee." To the extent that said bonds shall be demanded for the payment of shares of stock of other companies, or for the acquisition of any new or additional lines of railway, said bonds shall only be delivered by "Trustee" to "Railroads Company" simultaneously upon the delivery to it of an assignment of the said shares or transfer of the said lines of railway, to be held by "Trustee" as an additional security, under the terms and conditions of this Indenture.

Section 4. The remaining ——— dollars ($———) of said bonds shall be forthwith certified by "Trustee" and delivered to said "Railroads Company," to be used by it in part payment for the shares of capital stock of the ——— Electric Railway Company, the ——— Street Railway Company, hereinbefore mentioned and described.

Section 5. In case any of the bonds issued hereunder with the coupons thereto appertaining, or any registered bond, shall become mutilated, lost, or be destroyed, "Railroads Company," in its discretion, may issue, and thereupon "Trustee" shall certify and deliver a new bond of like tenor and date, bearing the same serial

number, in exchange and substitution for, and upon the cancellation of, the mutilated bond and its coupons, or the registered bond, or in case of loss or destruction upon receipt of satisfactory evidence thereof and satisfactory indemnity.

ARTICLE TWO.

Particular Covenants of "Railroads Company."

1.—*"The Railroads Company" hereby covenants as follows*:

Section 1. That it will duly and punctually pay, or cause to be paid, to every holder of any bond issued and secured hereunder, the principal and interest accruing thereon, at the dates and place, and in the manner mentioned in such bonds, or in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes on account thereof, which, under any present or future laws of the United States of America, or of the State of California, or any ordinance of the City and County of San Francisco," "Railroads Company" may be required to pay or retain therefrom, for national, state or municipal purposes. When and as paid, all such coupons shall be forthwith conceled.

Section 2. Whenever required by "Trustee." "Railroads Company" will do, execute, acknowledge and deliver, all and every such further acts, deeds, transfers, and assurances, for the better assuring, conveying and confirming unto "Trustee" all and singular the premises, estates and property hereby conveyed, or intended so to be, or which "Railroads Company" herein has covenanted and agreed to convey to "Trustee" as reasonably it shall require for the better accomplishment of the provisions and purposes of this indenture, and for securing payment of the principal and interest intended hereby to be secured.

Section 3. "Railroads Company," at its office in the City of San Francisco, or at an agency to be maintained by it in the City of New York, either or both, as "Railroads Company" shall determine, shall keep a sufficient register of bonds issued hereunder, which register at all reasonable times shall be open to the inspection of "Trustee." Upon presentation for such purpose, it will, under such reasonable regulation as it may prescribe, register therein any coupon bonds issued under the provisions hereof.

Upon presentation of any such registered bonds bearing a written power to transfer the same, executed by the registered holder, for the time being, in form approved by "Railroads Company," such bond shall be transferred upon such register. The registered

holder of any such bonds also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond shall be payable to any person presenting the same. Successive registrations and transfers as aforesaid may be made from time to time as desired, and each registration shall be noted by the bond registrar on the bond.

As to all bonds so registered, the person, in whose name the same shall be registered, shall, for all purposes of this Indenture, be deemed and be regarded as the owner thereof, and thereafter payment of, or on account of, the principal of such bond, shall be made only to or upon the order of such registered holder thereof, but such registration may be changed as above provided.

The registration of any coupon bond shall, however, not restrain the negotiability of any coupon thereto belonging, but every coupon shall continue to pass by delivery merely, and shall remain payable to bearer.

Section 4. "Railroads Company" will well and truly pay and discharge, or will acquire and deliver to "Trustee" for cancellation, or will extend, or cause to be extended, on or before the date of their maturity, all the outstanding bonds or underlying liens of the several railways acquired by "Railroads Company" above mentioned, and punctually pay, or cause to be paid, the interest on all such existing obligations, until the same shall either mature or be acquired by "Railroads Company."

Section 5. "Railroads Company" will pay all valid judgments, or claims, or make adequate provision for the satisfaction or discharge of the same, whether they consist of the demands of mechanics, laborers or others, which, if unpaid, might by law be given precedence to this Indenture as a lien or charge upon the mortgaged premises, or any part thereof, or the income thereof.

"Railroads Company," from time to time, will pay and discharge all taxes, assessments and governmental or municipal charges, lawfully imposed upon the lines of railway and other property, at any time subject to the lien hereof or upon any part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this Indenture shall be full-preserved in respect to such properties; provided, however, that nothing contained in this paragraph shall require "Railroads Company" to pay any such tax, assessment or charge, so long as "Railroads Company," in good faith, shall contest the validity thereof.

Section 6. That, commencing with the year ———, and on the

first day of January of that year, and on the first day of January in each year, thereafter, until all of said bonds, principal and interest, shall have been redeemed or paid, there shall be set apart a sum less than two per cent. (2%) of the gross earnings of said "Railroads Company" during the year then next preceding, but in no event to be less than the sum of One hundred thousand Dollars ($100,000).

The said sums so set apart shall, within sixty days thereafter, be deposited with Trustee as a Sinking Fund to be used in the redemption of said bonds issued hereunder under the instructions of the Board of Directors. To this end, notice should be published in one daily paper in the city of San Francisco, and one daily paper in the city of New York for such length of time as the Board of Directors may order, that bonds will be purchased therewith, and inviting bids for the surrender thereof at prices to be named by the bidders, and upon reception of said bids shall be accepted and bonds purchased to the extent of the money in the Sinking Fund, and all bonds so purchased shall be forthwith canceled and remain in the custody of the Trustee; provided, however, that the Board of Directors may, in their discretion, from time to time, direct the investment of said Sinking Fund in the bonds of Railroads Company at their par value or under, without inviting bids or in the purchase of Bonds secured by Mortgages now existing upon the properties acquired by "Railroads Company" and conveyed by this Deed of Trust to such extent as the same may, at the time, be redeemable, upon the terms fixed for such redemption, the same to be held by Trustee as a Sinking Fund investment or canceled as the Board of Directors shall order and determine.

Section 7. Until the bonds hereby secured have been fully paid, no dividends upon the Common Stock of "Railroads Company" shall be declared in excess of five per centum per annum, and all surplus income of said Company which, but for this restriction, would be applicable to the payment of dividends upon the Common Stock in excess of said percentage shall be reserved and applied as a Sinking Fund, for the payment of the bonds, secured hereby, or for the improvement of property conveyed by this Indenture.

To such extent as the Board of Directors shall, from time to time, ascertain and determine that there is surplus income, thus applicable, not deemed by them necessary to be used for the improvement of the property, it shall be their duty to apply the same as a Sinking Fund for the payment of bonds secured by this Indenture, in addition to the specific Sinking Fund provided for in Section 6 last preceding.

Section 8. "Railroads Company" further agrees, that until

the final payment of the bonds secured by this Indenture, it will not increase the amount of either its Preferred or Common Stock, excepting for cash received therefor at par.

Section 9. "Railroads Company" will not issue, negotiate, sell or dispose of any bonds hereby secured, in any manner other than in accordance with the provisions of this Indenture, and the agreements in that behalf herein contained; and in issuing, selling, negotiating or otherwise disposing of such bonds from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for the purposes herein prescribed, and to or for no other or different purpose.

Section 10. "Trustee" shall, whenever requested by resolution of the Board of Directors of "Railroads Company," give it full proxy to vote on all of the stocks of other corporations now owned, or which may hereafter be acquired, by "Railroads Company" and which are pledged under the terms of this Indenture, and "Railroads Company" until default in some one or more of the conditions of this Indenture shall be entitled to all the dividends received from any of said stocks, and "Railroads Company" covenants and agrees not to vote any of the stock pledged in this Indenture in any manner to affect or impair the bonds hereby secured or the lien or abligations of this Indenture or to place any other lien or indebtedness upon any of said properties or corporations, but may vote said stock to renew any present outstanding bonds or underlying liens, from time to time, as the same mature; and may also, from time to time, vote said shares for the purpose of decreasing the capital stock of, or dissolving said other corporations, or consolidating the same or any of them, when, in its judgment, the same is desirable, provided the security afforded by this Indenture shall not be thereby impaired or decreased.

All bonds now owned, or which are hereafter acquired by "Railroads Company," and which are pledged by the terms of this Indenture, may be used by "Railroads Company" in any foreclosure proceeding against any piece of property pledged to secure the payment of said bonds, and "Trustee" shall, at the request of "Railroads Company," exchange said outstanding bonds or underlying liens for any new bonds which may be created to pay off the issue of bonds of which those pledged hereunder form a part.

ARTICLE THREE.

Remedies of Trustee and Bondholders.

Section 1. Neither any coupon belonging to any bond hereby

secured, nor any claim for interest on any registered bond, which in any way, at or after maturity, shall have been transferred or pledged, separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this Indenture, except after the prior payment in full of the principal of such bond, and of all coupons or interest obligations belonging thereto not so transferred or pledged.

Section 2. In case default shall be made in the payment of any interest on any bond or bonds secured by this Indenture, and such default shall have continued for a period of six months, or in case default be made in the due observance or performance of any covenant or condition herein required to be kept or performed by "Railroads Company," which shall have continued for a period of three months after written notice thereof from "Trustee," or from the holders of five per cent. in amount of the bonds hereby secured, or in case default shall be made in the due and punctual payment of the principal of any bond hereby secured, then and in each such case, "Trustee" personally, or by its agents or attorneys, may enter into and upon all or any part of the railways, property and premises, lands, rights, interests and franchises hereby conveyed, or intended so to be, and into each and every part thereof, and may exclude "Railroads Company," its agents and servants, wholly therefrom, and having and holding the same, may use, operate, manage and control said railways, and other premises, regulate the transportation of passengers thereon, and conduct the business thereof, either personally, or by its superintendents, managers, agents and servants, to the best advantage of the holders of the bonds hereby secured; and upon every such entry "Trustee," at the expense of the Trust Estate from time to time, either by purchase, repairs or construction, may maintain and restore, and insure, and keep insured, the equipment, tools and machinery, and other property, buildings, and structures erected or provided for use in connection with the said railways and other premises, and may, from time to time, make all necessary or proper repairs, renewals, or replacements, and useful alterations, as it may deem judicious, and in such case "Trustee" shall have the right to manage the properties hereby conveyed either in the name of "Railroads Company," or otherwise, as it shall deem best; and it shall be entitled to collect and receive all tolls, earnings, rents, incomes and profits of the same and every part thereof; and after deducting the expenses of operating said railways and other premises, and of conducting the business thereof, and of all repairs and renewals, betterments and improvements, and all payments which may be made for taxes, assessments, or other proper charges, on the said prem-

ises and property, or any part thereof, as well as just and reasonable compensation for its own services, and for that of its agents, servants or other employes, it shall apply the money arising as aforesaid, as follows:—

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, such payments to be made ratably to the persons entitled thereto, without discrimination or preference.

In case the principal of the bonds hereby secured shall have become due, by declaration or otherwise, to the payment of the principal and accrued interest of all bonds hereby secured; in every instance, such payments to be made ratably to the persons entitled to such payments, without any discrimination or preference. These provisions are not in any way being intended to modify the provisions of *Section* 1 of this Article.

Section 3. In case default shall be made in the payment of any interest of any bond or bonds hereby secured, and any such default shall have continued for a period of six months, then and in every case of such continuing default, upon the written request of the holders of the majority in amount of the bonds hereby secured and then outstanding, "Trustee," by notice in writing, delivered to "Railroads Company," shall declare the principal of all bonds hereby secured and then outstanding, to be due and payable immediately and, upon any such declaration, the same shall become due, and be due and payable, immediately, anything in this Indenture, or in said bond, to the contrary notwithstanding. But if "Railroads Company" shall pay all arrears of interest of such bonds before any sale of the premises hereby conveyed shall have been made, then and in such case the holders of the majority in amount of the bonds hereby secured, and then outstanding by written notice to "Railroads Company" and to "Trustee," may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent defaults, or impair any right consequent thereon.

In case "Trustee" shall have proceeded to enforce any right under this Indenture, by foreclosure, entry or otherwise, and such proceeding shall have been discontinued, or abandoned, because of such waiver, or for any other reason, or shall have been determined adversely to "Trustee," then and in every such case "Railroads Company" and "Trustee" shall be restored to their former position and rights hereunder in respect of the premises hereby conveyed, and all rights, remedies and powers of the "Trustee" shall continue as thought no such proceedings had been taken.

Section 4. In case default shall have been made in the payment of any interest on any bonds at any time issued under and secured by this Indenture, and any such default shall continue for a period of six months, or in case default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by "Railroads Company," which shall continue for a period of three months after written notice thereof to "Railroads Company" from "Trustee," or from the holders of five per cent. in amount of the bonds hereby secured, or in case default shall be made in the due and punctual payment of the principal of any bond hereby secured, then and in each case of such default, "Trustee," with or without entry, personally or by attorney, in its discretion, may sell to the highest and best bidder all and singular the property and premises, rights, franchises, interests and appurtenances hereby conveyed, and all the other real and personal property aforesaid of every kind, and all right, title and interest, claim and demand therein, and the right of redemption thereof, in one lot and as an entitrety, unless a sale in parcels shall be requested and required by the holders of seventy-five per cent. in amount of the bonds hereby secured and then outstanding, in which case such sale may be made in parcels. Said sale or sales shall be made at public auction, at such place in the City and County of San Francisco, and at such time and upon such terms as "Trustee" may fix and specify in the notice of sale to be given, or as may be required by law. Immediately upon the expiration of the six and three months' periods in the two cases last indicated, and immediately upon the default in payment of principal in the other case, "Trustee" may proceed to protect and enforce its rights and the rights of bondholders under this Indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted or for the foreclosure of this Indenture, or for the enforcement of any other appropriate legal or equitable remedy, as "Trustee" shall deem most effectual to protect or enforce any of its rights or duties hereunder.

Upon the written request of the holders of twenty-five per cent. in amount of the bonds hereby secured, in case of any such continuing default, it shall be the duty of "Trustee," upon being indemnified as hereinafter provided, to take all needful steps for the protection and enforcement of its rights, and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings, by action, suit or otherwise, as "Trustee" shall deem most expedient in the interest of the holders of the bonds hereby secured.

Section. 5. Anything in this indenture contained to the contrary notwithstanding, the holders of a majority of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct and to control the method and place of conducting any and all proceedings for any sale of the premises hereby conveyed or pledged, or for the foreclosure of this Indenture, or for the appointment of a receiver, or for the purpose of taking any other proceedings whatsoever, but whatever proceedings "Trustee" may take shall be deemed approved for the time being until disapproved or disavowed in writing by the holders of a majority of the outstanding bonds.

Section 6. "Trustee," from time to time, may adjourn any sale to be made by it under the provisions of this Indenture, by announcement at the time and place appointed for such sale or for such adjourned sale or sales, and without further notice or publication it may make such sale at the time and place to which the same may be so adjourned.

Section 7. Upon the completion of any sale or sales under this Indenture, "Trustee" shall execute and deliver to the purchaser or purchasers good and sufficient deeds of conveyance of the property and franchises sold, and "Trustee" or its successors are hereby appointed the true and lawful attorney or attorneys, irrevocably, of "Railroads Company," in its stead, to make all necessary deeds and conveyances of property thus sold, and for that purpose it or they may execute all necessary acts of assignment and transfer, "Railroads Company" hereby ratifying and confirming all that its said attorney or attorneys shall lawfully do in virtue hereof.

Any such sale or sales made under or by virtue of this Indenture, whether under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of "Railroads Company," of, in and to the premises sold, and shall be a perpetual bar, both at law and in equity, against "Railroads Company," its successors and assigns, and against any and all persons claiming or to claim the premises sold, or any part thereof, from, through, or under "Railroads Company," its successors or assigns.

The personal property and chattels, conveyed or intended to be conveyed by or pursuant to this Indenture, shall be held and taken to be fixtures and appurtenances of the said railways, and part thereof, and are to be used and sold herewith, and not separate therefrom, except as herein otherwise provided.

Section 8. The receipt of "Trustee" shall be a sufficient discharge to any purchaser of the property, or any part thereof, sold as aforesaid, for the purchase money, and no purchaser, or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this Indenture, or in any manner whatsoever be answerable for any loss, misapplication or non-application of any such purchase money or any part thereof, or be bound to inquire as to the authorization. necessity, expediency or regularity of any such sale.

Section 9. In case of any sale, whether under the Power of Sale hereby granted or pursuant to judicial proceedings, the principal sums of all the bonds hereby secured, if previously due, immediately thereupon shall become due and payable, anything in said bonds to the contrary notwithstanding.

In case the railways, property and premises hereby conveyed, or any part thereof, shall be sold pursuant to any provision of any mortgage or deed of trust securing any of the existing mortgage debts or underlying liens hereinbefore mentioned, thereupon, in every case, the principal of all the bonds hereby secured shall forthwith become and be due and payable, anything in said bonds or in this Indenture to the contrary notwithstanding.

Section 10. The purchase money, proceeds and avails of any such sale, whether under the power of sale hereby granted, or pursuant to judicial proceedings together with any other sums which then may be held by "Trustee," under any of the provisions of this Indenture, as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to "Trustee," its agents, attorneys and counsel, and of all expenses, liabilities and advances, made or incurred by "Trustee" in managing and maintaining the property hereby conveyed, and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens to which such sales shall have been made subject;

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest,

ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of Section 1 of this Article.

Third. To the payment of the surplus, if any, to "Railroads Company," its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

Section 11. In case of any sale hereunder any purchaser, for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in any bonds and any matured and unpaid coupons hereby secured, in order that they may be credited, as paid thereon, the sums payable out of the net proceeds of such sale to the holder of such bonds and coupons, as his ratable share of such net proceeds, after allowing for the proportion of the total purchase price required to be paid in cash to pay the costs and expenses of the sale, or otherwise; and such purchaser shall be credited on account of the purchase price of the property purchased, with the sums payable out of such net proceeds on the bonds and coupons so turned in; and, at any such sale, any bondholders may bid for, and purchase, such property, and may make payment therefor as aforesaid, and upon compliance with the terms of sale, may hold, retain and dispose of such property without further accountability therefor.

Section 12. "Railroads Company" will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now, or at any time hereafter in force in any locality where the premises or property conveyed, or any part of either, may or shall be situate, nor will it claim, take or insist on any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the said premises or property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained or to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by any State, to redeem the property so sold or any part thereof, and it hereby expressly waives all benefit and advantage of any such law or laws; and it covenants that it will not hinder, delay or impede, the execution of any power herein granted and delegated to "Trustee," but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

Section 13. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding

in equity or at law for the foreclosure of this Indenture, or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to "Trustee" written notice of such default and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent. in amount of the bonds hereby secured, then outstanding, shall have made written request upon "Trustee" and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name; nor unless, also, they shall have offered to "Trustee" adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby and shall have deposited their bonds with trustee as evidence of the ownership thereof; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of "Trustee," to be conditions precedent to the execution of the powers and trusts of this Indenture, and to any action, or cause of action, for foreclosure, or for the appointment of a Receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this Indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

Section 14. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to "Trustee," is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be given in addition to every other remedy given hereunder or now, or hereafter, existing at law, or in equity, or by statute.

Section 15. No delay or omission of "Trustee," or of any holder of bonds hereby granted, to exercise any right or power accruing upon any default continuing as aforesaid shall impair any such right or power, or shall be construed to be a waiver of any such default, or acquiescence therein; and every power and remedy given by this article to "Trustee" or to the bondholders may be exercised, from time to time, and as often as may be deemed expedient by "Trustee" or by the bondholders.

ARTICLE FOUR.

Immunity of Officers, Directors and Stockholders.

No recourse under or upon any obligation, covenant or agreement of this Indenture, or of any bond or coupon thereby secured,

shall be had against any incorporator, stockholder, officer or director of "Railroads Company," or of any successor corporation, either directly or through "Railroads Company," by the enforcement of any assessment, or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this mortgage, and the obligations hereby secured are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, stockholders, officers, or directors of "Railroads Company," or of any successor corporation, or any of them, under or by reason of any of the obligations, covenants or agreements contained in this Indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all such personal liability of every name and nature, either at common low or in equity, or by statute, or constitution, of every such incorporator, stockholder, officer or director, is hereby expressly waived as a condition of, and consideration for, the execution of this Indenture and issue of such bonds and coupons, and delivery thereof.

ARTICLE FIVE.

Bondholders' Acts, Holdings and Apparent Authority.

Section 1. Any request or other instrument required by this Indenture to be signed and executed by the bondholders may be in any number of concurrent instruments of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this Indenture, if made in the following manner:

Section 2. The fact and date of the execution by and person of any such request, or other instrument, or writing, may be proved by the certificate of any Notary Public, or other officer authorized to take acknowledgments of deeds to be recorded in California, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of witness of such execution.

Section 3. The amount of coupon bonds transferable by delivery, held by any person executing and such request or other instrument as a bondholder, and the amounts and issue number of the bonds held by such persons, and the date of his holding the same, may be proved by a certificate executed and duly acknowledged by any trust company, bank, bankers or other

depository (wherever situated) if such certificate shall be deemed by "Trustee" to be satisfactory, showing therein that at the date therein mentioned such person had no deposit with such depository the bonds described in such certificate. The ownership of registered bonds hall be proved by the registers of such bonds as provided in Section 3 of Article Two hereof. Such proof shall be conclusive in favor of "Trustee" with regard to any action by it taken under such request or other instrument.

Section 4. The holder of any coupon bond hereby secured at the time, which shall not be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether the same shall be registered or not, may be deemed and treated by "Railroads Company" and "Trustee" as the absolute owner of such bond or coupon, as the case may be, for the purpose of receiving payment thereof, and for all other purposes, and no notice to the contrary shall affect "Railroads Company" or "Trustee."

ARTICLE SIX.

Releases of Trust Property.

***Section* 1.** Until default in some one of the conditions of this Indenture, "Trustee," upon request of "Railroads Company," by resolution of its Board of Directors, from time to time, shall release from the lien and operation of this Indenture, any part of the hereby conveyed property then subject thereto save and except the stocks and bonds herein specifically pledged; provided, that no part of the lines of track, or of the rights of way, shall be released, unless the same shall no longer be of use in the operation of any of the lines of railway hereby conveyed, and no part of such lines of track or rights of way shall be so released if thereby the continuity of the lines of railway of "Railroads Company" shall be broken; and no part of the railways or other property hereby conveyed shall be released hereunder, unless, at the time of such release, it shall have been determined by resolution of said Board of Directors of "Railroads Company" that it will no longer be necessary or expedient to retain the same for the operation, maintenance or use of such lines of railway or for use in the business of "Railroads Company." The evidence of such release or waiver shall either be a separate instrument, executed by "Trustee," or, in the grant of any real estate which may be sold by said company after the further retention thereof has been determined as aforesaid to be unnecessary, "Trustee" may be joined therein, expressing such release or waiver.

"Railroads Company" shall have the right from time to time,

to sell or exchange any of the rolling stock, electrical machinery or other plant which may be worn out or superseded and to substitute therefor new or improved equipment or machinery, and such sale or exchange of the equipment or machinery may be made by "Railroads Company" at its option, by a resolution of the Board of Directors, and the release or waiver of lien of this Indenture for such purposes need not be made by "Trustee," but such new equipment or machinery shall be and become subject to the lien of this Indenture, when the same is placed upon the railway or in the power houses of said Company.

The proceeds of any and all sales under the provisions of this article, from time to time, as received by "Railroads Company," whether derived from the sale of real estate and other property, which shall be released from the lien of this Indenture by Trustee, or from the sale by "Railroads Company" under the provision hereof, of rolling stock, electrical machinery or other plant not replaced by new or improved stock, machinery or plant of equal value, shall be deposited by "Railroads Company" with Trustee as a Special Fund to be used and applied, from time to time, under the direction of its Board of Directors by resolution thereof, the evidence of which shall be a certificate under the seal of the Company, attested by its President or Vice President and Secretary, in the acquisition of other property, real or personal, in the name of, and for the benefit of "Railroads Company," as shall be determined by its said Board, all of which property when and as acquired shall forthwith fall into and form part of the property and estate conveyed by this Indenture, to which end "Railroads Company" will, upon request of Trustee, execute and deliver all necessary and appropriate instruments in writing; provided, however, that at the discretion of the Board of Directors of "Railroads Company," and upon their order, such Special Fund, in whole or in part at any time remaining, may be transferred to the Sinking Fund hereinabove provided, and applied to the purposes thereof in the manner set forth with respect thereto. No such transfer, however, shall relieve "Railroads Company" from its duty to set apart and pay to said Sinking Fund, the yearly sum provided in Section 6 of Article Two of this Indenture.

The purchaser or purchasers of any property so sold or disposed of under this Section shall not be required to see to the application of the purchase money. A certificate signed by the President, or Vice President, and the General Manager of "Railroads Company" may be received by "Trustee" as conclusive evidence of any of the facts mentioned in this Article, and shall be a full warrant to "Trustee" for its action on the faith thereof, but "Trustee" in its discretion may require such further and additional evidence as to it may seem reasonable.

ARTICLE SEVEN.

Concerning Trustee.

Section 1. The party of the second part, "Trustee," hereby accepts the trusts of these presents, but with the understanding and it is hereby expressly provided and agreed that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may in good faith and with reasonable discretion be appointed or employed by it, under and by virtue of or for the purposes of these presents; that no other liability or responsibility shall under any circumstances be borne by or attached to it than for the exercise of reasonable diligence only in the performance of the trusts of this Indenture, and that it shall not be responsible for any of the recitals herein, or for the truth or accuracy of any of the certificates of "Railroads Company," or of its officers or Directors, upon the presentation of which "Trustee" is called upon to act. "Trustee" shall not be personally liable for any debts contracted by it, or for damages to persons, or property carried or injured, or for salaries, or non-fulfillment of contracts, during any period wherein "Trustee" shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. "Trustee" shall not be under any obligation to take any action towards the execution or enforcement of the trusts hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by "Trustee," furnish at reasonable indemnity against such expense or liability; nor shall "Trustee," be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at lease five per cent. in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent. in amount of the bonds hereby secured, then outstanding, and the deposit of the same with it as evidence of ownership, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such notice or request, nor this provision thereof, shall affect any discretion herein given to "Trustee" to determine whether or not it shall take action in respect of such default, or to take action without such request. "Trustee" shall not be responsible for the legal execution or the recording of this Indenture.

"Trustee" shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

Section 2. "Trustee," or any trustee hereafter appointed, may resign, and be discharged of the trusts created by this Indenture by giving notice thereof to "Railroads Company" and to the bondholders, by publication, at least twice a week, for four successive weeks, in one newspaper at that time published in the City and County of San Francisco, State of California, and by due execution of the conveyance herein required.

"Trustee" may be removed at any time by an instrument in writing under the hands of the holders of two-thirds in amount of the bands hereby secured and then outstanding.

Section 3. In case at any time "Trustee," or any trustee hereafter appointed, shall resign or be removed or otherwise become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders, or their attorneys in fact, duly authorized; provided, nevertheless, and it is herby agreed and declared that, in case at any time there shall be a vacancy in the office of "Trustee" hereunder, "Railroads Company" shall have the right to apply to any court of competent jurisdiction for the appointment of a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein provided. Any such new trustee appointed hereunder, shall execute, acknowledge and deliver to the trustee last in office and also to "Railroads Company" an instrument accepting such appointment hereunder, and thereupon such new trustee without any further act, deed or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor in the trust hereunder with like effect as if originally named as trustee herein; but the trustee ceasing to act shall, nevertheless, at expense of "Railroads Company," on the written request of the new trustee, execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers and trusts of the trustee so resigned or removed, and shall duly assign, transfer and deliver any property and moneys held by such trustee so appointed in its place.

Should any deed, conveyance or instrument in writing from "Railroads Company" be required by any new trustee, for more fully and certainly vesting and confirming to such new trustee such estate, rights, powers and duties, any and all such deeds, conveyances and instruments in writing shall, on request, be made, executed, acknowledged and delivered by it.

ARTICLE EIGHT.

"Railroads Company's" Possession until Default.

Section 1. Until some default shall have been made in the due and punctual payment of the interest, or of the principal of the bonds hereby secured, or of some part of such interest, or principal or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon "Railroads Company," and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, "Railroads Company," its successor or assign, shall be suffered and permitted to retain actual possession of all the premises and property hereby conveyed, except bonds and stocks, and to manage, operate and use the same, and every part thereof, with the rights and franchises appertaining thereto, and to collect, receive, take, use and enjoy the tolls, earnings, income, rents, issues and profits thereof.

Section 2. If, when the bonds hereby secured shall have become due and payable, "Railroads Company" shall well and truly pay, or shall cause to be paid, the whole amount of the principal moneys and the interest due upon all the bonds, and the coupons for interest thereon, hereby secured, and then outstanding, or shall provide for such payment by depositing with "Trustee" hereunder for the payment of such bonds and coupons the entire amount due thereon for principal and interest, and shall also pay, or shall cause to be paid, all other sums at the time payable hereunder by "Railroads Company," and shall well and truly keep and perform all things herein required to be kept and performed by it according to the true intent and meaning of this Indenture, then and in that case, all property, rights and interests hereby conveyed shall revert to "Railroads Company," and the estate, right, title and interest of "Trustee" shall thereupon cease, determine and become void, and "Trustee," in such case, on demand of "Railroads Company," and at its cost and expense, shall enter due satisfaction of this Indenture upon the records, and execute and deliver such instruments in writing as may be reasonably required by "Railroads Company" to revest in it the full and legal title of the estate, property and premises hereby conveyed; otherwise, the same shall be continued and remain in full force and virtue.

ARTICLE NINE.

Sundry Provisions.

Section 1. All the covenants, stipulations, promises and agreements in this Indenture contained, by or in behalf of "Railroads

Company," shall bind its successors and assigns whether so expressed or not.

Section 2. Except when otherwise indicated, the words "Trustee" or any other equivalent term, as used in this Indenture, shall be held and construed to mean the trustee or trustees for the time being, whether the original or a successor; the words "Trustee," "bond," "bondholder," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," and the words "bonds hereby secured" shall include every existing and unpaid bond which shall be issued hereunder and intended to be secured hereby.

In witness whereof, the A. B. Railroad Company, party of the first part, has caused these presents to be signed in its name and behalf by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, the day and year first above written.

And the said ——— Trust Company of San Francisco, party of the second part, has caused these presents to be signed in its name and behalf by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, the day and year first above written.

A. B. RAILROAD COMPANY,
By JOHN DOE,
President.

(SEAL)

Attest: RICHARD DOE,
Secretary.

——— TRUST COMPANY OF SAN FRANCISCO,
By THOMAS DOE,
President.

(SEAL)

Attest: WILLIAM DOE,
Secretary.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

On this ——— day of ———, A. D. ———, before me, ———, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared ——— and ———, known to me to be the President and Secretary, respectively, of the A. B. Railroad Company, the corporation described in and that executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

_____,
Notary Public in and for the City and County of San Francisco, State of California.
(Notarial Seal)

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

On the ——— day of ———, A. D. ———, before me, ———, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared ——— and ———, known to me to be the President and Secretary, respectively, of the ——— Trust Company of San Francisco, the corporation described in and that executed the within and annexed instrument, and acknowledged to me that such corporation executed the same.

In witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

_____,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

——— and ———, President and Secretary, respectively, of the United Railroads of San Francisco, the party of the first part in the foregoing Indenture named, each being duly sworn, each for himself and not one for the other, doth depose and say: That the aforesaid Indenture is made in good faith and without any design to hinder or delay or defraud any creditor or creditors of said party of the first part.

_____

_____

Subscribed and sworn to before me, this ——— day of ———, A. D. ———.

_____,
Notary Public in and for the City and County of San Francisco, State of California.
(Notarial Seal)

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS.

——— and ———, President and Secretary, respectively, of the ——— Trust Company of San Francisco, the Trustee in the foregoing Indenture named, each being duly sworn, each for himself and not one for the other, doth depose and say: That the aforesaid Indenture is made in good faith and without any design to hinder or delay or defraud any creditor or creditors of the United Railroads of San Francisco, the party of the first part therein named.

Subscribed and sworn to before me, this ——— day of ———, A. D. ———.

Notary Public in and for the City and County of San Francisco, State of California.

Form 381.

Mortgage—Attorneys' Fees, etc.

This Mortgage, made the ——— day of ———, in the year one thousand nine hundred and ——— by ——— Mortgagor—, to ——— Mortgagee—, witnesseth: That the Mortgagor—mortgage— to the Mortgagee— all that real property situate in the ——— County of ———, in the State of California, and known, designated and described as follows, to wit: ——— together with all improvements thereon, and the hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof, as security for the payment to said Mortgagee—of a certain promissory note, in the words and figures following: $——— ———, ———, ———, 19—, ——— after date, for value received, ——— promise to pay to ——— or order, ——— dollars, in gold coin, of the present standard of value, with interest thereon from date until paid, at the rate of ——— per cent., per ——— in like coin, payable ——— and if not so paid the interest may be added to the principal and bear like interest, and the whole note may, at the option of the holder, without notice to the maker— thereof, be treated as due and collectible. If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder—, until paid: and during such year the maker— shall not have the right to pay the same. Both principal and interest to be paid at ——— and also to secure all other indebtedness of every kind and description that

may hereafter, during the continuance of this mortgage, and until the aforesaid note is fully paid, be due, owing, or existing from said Mortgagor—, or either of them, to said Mortgagee—.

And it is hereby further agreed, That the Mortgagor— shall and will keep the improvements upon the mortgaged premises insured for two-thirds their actual cash value, and will have such insurance made payable to the Mortgagee— as additional security for the payment of the indebtedness secured or which may be secured by this mortgage; and in default of keeping said improvements insured as aforesaid, then said Mortgagee— may cause the same to be insured at the expense of the said Mortgagor—; and that the Mortgagor— will, on demand, repay to the Mortgagee—, in gold coin, all moneys paid by the Mortgagee— to obtain said insurance, and also all sums paid by the Mortgagee—, to discharge any tax or assessment on said premises or the improvements thereon, not chargeable against the Mortgagee— under the Constitution and Laws of said State, which payments the Mortgagee is hereby authorized to make, and that this mortgage shall stand as security for the repayment to the Mortgagee— of all sums which ——— shall have paid for the purposes aforesaid, or for any of them, together with interest thereon, from the date of payment thereof, at the rate of ten per cent. per annum, until payment is made to the Mortgagee—; and in case it shall become necessary to defend or intervene to protect the title to said property, or the right to the possession thereof, or the right or lien of this mortgage, in any action of ejectment, suit for partition or to foreclose a lien, or any other legal proceeding whatsoever, the said Mortgagee— or his assigns may take charge and control of such intervention or defense, and this mortgage shall stand as security for the repayment of all moneys expended in such defense or intervention, for counsel fees or otherwise, together with interest thereon at the rate of ten per cent. per annum.

And in case default be made in the payment of said not, or of any installment thereof, or of any interest due thereon, or of any other indebtedness secured by this mortgage, then the Mortgagee— may, at his option and without notice to the Mortgagor—, at once proceed to foreclose this mortgage, and in such proceeding to foreclose, he shall be allowed a reasonable and just sum, to be fixed by the Court, with which to pay the attorney's and counsel fees in such foreclosure proceedings, in gold coin, which sum shall be secured by this mortgage, and shall become due upon the filing of the complaint; and on the filing of such complaint in such foreclosure proceeding, or at any time thereafter, the Court shall, if requested by the Plaintiff—, name some disinterested person as Receiver, and shall authorize such Receiver to at once take possession of the mortgaged premises and

collect the rents and profits thereof, and apply them to the satisfaction of such judgment, and to sell said premises in the same manner as lands are sold upon execution, and to continue in the use and possession of said premises, and to collect the rents and profits thereof until the premises are redeemed from such sale, or until title is vested in the purchaser, by the execution of a conveyance in pursuance of the sale.

In case default be made in the payment of the principal, or of any installment thereof, or of the interest, or of any installment thereof, or of any other indebtedness secured by this mortgage, then the said Mortgagee, or his assigns shall, at his option be entitled to the immediate possession of said premises, with the right to manage the same as a mortgagee in in possession, and to collect and apply the net rents towards the payment of the indebtedness secured by this mortgage, and the said Mortgagor—and all persons claiming under him shall, upon demand, in such event, forthwith deliver the possession of said premises to the said Mortgagee— or his assigns.

In Witness Whereof, etc.

..... (SEAL.)
..... (SEAL.)
..... (SEAL.)

Form 382.

Mortgage, Installment Note, Power of Sale.

This Mortgage, made the ——— day of ——— in the year nineteen hundred and ——— by A. B. of the County of ———, State of ———, Mortgagor, to C. D. Bank, a corporation, duly organized and existing under the laws of the State of California, and whose principal place of business it at the said City and County, Mortgagee.

Witnesseth: That the Mortgagor hereby grants and transfers by way of Mortgage, and hereby hypothecates and mortgages to the Mortgagee, the real property situate in said County, and described as follows:

The Mortgagor has received from the Mortgagee the sum of ——— Dollars, as a loan; the Mortgagor has executed and delivered to the Mortgagee the Promisory Note of the Mortgagor, of even date herewith, for the sum of ——— Dollars, being the amount of said loan and the interest thereon; said Promissory Note is payable to the order of the Mortgagee in ——— equal monthly installments of ——— Dollars each; by the terms of said Promissory Note, said installments are made payable at the office of the Mortgagee in San Francisco, and are to bear interest from ma-

turity until paid, at the rate of two per cent. per month, and upon default in payment of any installment, or upon any change being made in the title to said property, the whole unpaid principal sum is to become due at the option of the payee; and is to bear interest thereafter until paid at the rate of two per cent. per month, and all payments are to be made only in gold coin of the United States.

This Mortgage is made as security for the payment of said Promissory Note, according to its terms, or any renewal or extension thereof, and for the payment of said sum of money and the interest thereon, and for the discharge and performance of every obligation imposed upon the Mortgagor by the terms of this Mortgage.

The Mortgagor hereby promises to pay said sum of money, and the interest, to the Mortgagee, or order, as provided in said Promissory Note.

This Mortgage, or the Mortgagor's right of redemption, may be foreclosed by suit, or proper judicial proceedings, at any time after default made in the payment of any of said installments, as provided in said Promissory Note, or after the breach of any obligation for which this Mortgage is security; and if such suit be brought, there shall be due to the Plaintiff, for counsel fees, on filing the complaint, the amount of five per cent. of the debt due from the Mortgagor to the Plaintiff and also the cost of continuing the abstract of title to said real property from the date hereof to any date or dates required by said Mortgagee, and furthermore the costs of drawing all necessary copies of said complaint and the summons issued thereon; and the Mortgagor and mortgaged property are hereby made liable to the Mortgagee for such counsel fees, such abstracting and such costs.

And the Mortgagor hereby empowers the Mortgagee to sell and convey said mortgaged property at any time after default made in the payment of any of said installments, as provided in said Promissory Note, or after the breach of any obligation for which this Mortgage is security; any such sale may be public or private, at the option of the Mortgagee and may be made after such notice, and for such price, and on such terms as to payment or otherwise, as the Mortgagee may deem proper; at any such sale the Mortgagee, in its own name, or in the name of any person, shall have the right to purchase; and the Mortgagor hereby authorizes and empowers the Mortgagee to execute and deliver, in the name of the Mortgagee, a good and sufficient deed and conveyance of said property, or any part thereof; and any recitals contained in any conveyance of the mortgaged property which may be made by the Mortgagee, must be deemed conclusive evidence of the facts recited; the proceeds of such sale must be applied to the payment, in whole or in part, of the expenses of the

sale, and of the amount due to the Mortgagee upon this Mortgage and upon said Promissory Note; and upon any such sale counsel fees shall be allowed as part of the expenses, at the rate of two per cent. upon the amount of the debt, and the Mortgagor and mortgaged property are hereby made liable to the Mortgagee for such counsel fees. The surplus proceeds of any such sale shall be paid to the Mortgagor.

In consideration of the granting of said loan to the Mortgagor by the Mortgagee, the Mortgagor hereby waives any and all defenses which may now or hereafter exist by virtue of any homestead statute, statute of limitation, or otherwise, to any action brought to foreclose said note or Mortgage, or to the exercise of the power of sale herein contained, except the sole defense of payment.

The Mortgagor hereby promises to pay any and all taxes that may be levied or assessed upon this Mortgage, or upon the money or debt hereby secured, or upon the said real property, and it is expressly agreed that the payment by said Mortgagor of any or all of such taxes shall not constitute a payment on account of the debt secured by this Mortgage, or to the extent of such payment a full or any discharge thereof.

The Mortgagee is also hereby empowered, for account of the Mortgagor, to purchase any adverse claim to or pay and discharge any and all liens upon, the mortgaged property, including any clim or lien arising from or relating to any tax or taxes that may be laid, levied, imposed or assessed upon this Mortgage, or the money or debt hereby secured, or upon said real property, and the fact of such payment shall conclusively establish the validity and legality of all such claims or liens, and to maintain or defend any action or proceeding at law affecting the title to the property hereinabove described, and upon the filing of any pleading in any such action, or proceeding, there shall be due to the Mortgagee, or its successors, for counsel fees therein, a sum equal to two per cent. of the amount due under the terms of said note or Mortgage.

The power to discharge liens, and to purchase adverse claims hereinbefore given to the Mortgagee may be exercised without notice to the Mortgagor or to the Mortgagor's successors in interest.

All money which may be paid by the Mortgagee, for account of the Mortgagor, as herein provided, shall bear interest at the rate of two per cent. per month, from the respective dates of payment, and shall be payable to the Mortgagee, with their interest thereon, at the same time as, and with the amount of said Promissory Note, and the Mortgagor and mortgaged property are hereby made liable to the Mortgagee for the amount of all such payments, and the interest thereon.

The mortgaged buildings must be kept insured by the Mortgagor for the security of the Mortgagee, in the sum of ——— Dollars. The Mortgagor failing to effect such insurance, the same may be effected by the Mortgagee; and the Mortgagor and mortgaged property are hereby made liable to the Mortgagee for the cost of such insurance and interest thereon at the rate of two per cent. per month. Insurance by the Mortgagor must be effected with a Company approved by the Mortgagee.

All money that may become due to the Mortgagee under the terms of this Mortgage, must be paid in Gold Coin of the United States.

A breach of any obligation for which this Mortgage is security shall entitle the Mortgagee to immediate possession of the mortgaged property; and in any action to foreclose this Mortgage, a Receiver shall be appointed, if required by the Plaintiff, to collect the rents of the property and apply the net proceeds thereof as directed by the Court in which said action is pending.

The covenants herein contained shall be binding upon the parties hereto, and upon their heirs, administrators, successors or assigns.

Witnesseth the hand and seal of the Mortgagor.

..... (SEAL.)

Form 383.

Satisfatcion of Mortgage.

Know all men by these presents: That that certain Mortgage, dated ——— 190—, and made by ——— the part— of the first part, to ——— the part— of the second part, and recorded in the office of the County Recorder of the ——— County of ———, State of ———, in Book ——— of Mortgages, at page ———, on the ——— day of ——— 190—, together with the debt thereby secured, is fully paid, satisfied and discharged

In witness whereof, ——— have hereunto set ——— hand— and seal—.

Form 384.

Same. Massachusetts Form.

Know all men by these presents, that I, ——— of ———, the mortgagee named in a certain mortgage given by ——— to me, dated the ——— day of ———, A. D. 19—, and recorded with ——— deeds, lib. ———, fol. ———, do hereby acknowledge that I have received from ———, the mortgagor named in said mort-

gage, full payment and satisfaction of the same; and in consideration thereof I do hereby cancel and discharge said mortgage, and release and quitclaim unto the said ———, and his heirs and assigns, forever, the premises thereby conveyed. In witness whereof I hereunto set my hand and seal this ——— day of ———, A. D. 19—.

Form 385.

Same. New York Form.

I do hereby certify that a certain indenture of mortgage bearing date the ——— day of ———, 19—, made and executed by ——— of ———, to me, ——— of ———, and recorded in the office of the clerk of the county of ———, in book ——— of mortgages, page ———, on the ——— day of ———, 19—, at ——— o'clock ——— minutes A. M., is with the bond accompanying it fully paid and satisfied. And I do hereby consent that the same be discharged of record. Dated the ——— day of ———, 19—.

Form 386.

UTAH. *Certificate of Discharge.*

This certifies that a (*mortgage or deed of trust, as the case may be*) from A. B. to C. D., dated ———, A. D. ———, and recorded in book ——— of ——— on page ———, is hereby canceled and discharged. Signed in presence of ———, Recorder ——— County.

Form 387.

Provision for Payment on Demand of Moneys Due a Bank on Current Account.

Provided, nevertheless, that if the said mortgages shall on demand pay or cause to be paid unto the said company all sums of money which now are or may from time to time hereafter become due or owing from the said mortgagor, whether solely, or together with any other person or persons in account current with the said Bank, whether for money paid and advanced or upon checks, promissory notes, or bills of exchange, drawn, accepted, or indorsed by the said mortgagor, or which shall have been paid to his credit, either solely or together with any such person or persons as aforesaid, or for interest, commission, and customary banker's charges, or any other matter whatever; and will pay in-

terest at the rate of ——— per cent. per annum until actual payment of the sums to be paid pursuant to such demand, then these presents shall be null and void.

Form 388.

Reduction of Interest to be Made for Punctual Payment of Same.

Provided always, and it is hereby covenanted and agreed, that if the said mortgagor, his heirs, executors, administrators, or assigns, shall and will on every day on which the interest is hereinbefore made payable, or within ——— days after each of such days respectively, pay to the said mortgagee, his executors, administrators, or assigns, interest for the principal sum for the time being owing to him or them on this mortgage, at the rate of ——— (*specify the reduced rate*) per cent. per annum, and if the said mortgagor, his heirs, executors, administrators, and assigns, shall at all times faithfully perform and observe all the covenants and agreements herein contained, and on his or their parts to be performed or observed, then and in such case the said mortgagee, his executors, administrators, or assigns, shall accept interest for the principal sum for the time being owing as aforesaid at the rate of ——— (*the reduced rate*) per cent. per annum, for every period for which such interest shall be punctually paid within the time limited as aforesaid.

Form 389.

Same. Another Form.

Provided always, that if interest for such principal sum as shall for the time being be due on this security, at the rate of ——— per cent. per annum, shall be paid on every ——— day of ——— and ——— day of ———, or within ——— days next after each of the said days respectively, then and in every such case such payment of interest during the term of ——— years from the date hereof, but not afterwards, shall be accepted by the mortgagee, and his executors, administrators, or assigns, instead of the interest which would otherwise have been payable for the half year in respect of which such payment shall have been made; but it is understood that nevertheless the mortgagor, his heirs, executors, administrators, and assigns, shall not be entitled to the benefit of this agreement for the reduction of interest whilst any interest previously due remains unpaid, or whilst the mortgagee, or his executors, administrators, or assigns, or any receiver appointed in his or their behalf, shall be in possession or in receipt of the rents and profits of all or any of the said premises covered by this mortgage.

Form 390.

Agreement that Whole Debt Shall Become Due upon Default in Payment of any Installment of Principal or Interest.

Provided also, that if the said grantor, his heirs, executors, or administrators, shall at any time make or suffer default in the payment of any of the said installments or interest, or any part thereof respectively, for the period of ——— days after the time hereinbefore appointed for the payment thereof, or in the performance of any of the covenants or agreements on the part of said grantor herein contained, then and in any such case the whole of said principal money which shall for the time being remain unpaid shall immediately become payable, and shall be paid, with interest at the rate aforesaid, by the said grantor, his heirs, executors, or administrators, to the said grantee, his executors, administrators, or assigns, on demand.

Form 391.

Same. Short Form.

And in case default be made in the payment of said note or of any installment thereof, or of any interest due thereon, or of any other indebtedness secured by this mortgage, then the mortgagee may at his option and without notice to the mortgagor, at once proceed to foreclose this mortgage.

Form 392.

Provision in Trust Deed for Selling in Case of Default.

If default shall be made in the payment of said note— first mentioned and interest when due, or any indebtedness evidenced by any instrument in writing, as aforesaid, or in the reimbursement of any moneys as herein provided to be paid out and expended, or any advances for taxes, liens, incumbrances, insurance, etc., or any other sum due to party of the third part, with the interest thereon, on demand, as hereinabove expressed, then it shall be lawful for the said parties of the second part, or the survivor of them, their successors or assigns, on the application of the party of the third part, or its assigns, to sell the above granted premises, or such part thereof as in their discretion they shall find it necessary to sell in order to accomplish the objects of this trust in the manner following, to wit:

They shall publish notice of the time and place of such sale, with a description of the property to be sold, at least one time a week for theree successive weeks, in some newspaper published in the County of ———, State of ———, and may from time to time postpone such sale by publication, and on the day of sale so advertised, or to which such sale may be postponed, at the place named, they may sell the property so advertised, as a whole or in subdivisions, as the parties of the second and third party may deem best, at public auction, in any county where any part of said property may be situated, or in the City of ———, to the highest bidder for cash, in United States gold coin; and at such sale the holder of any note or instrument in writing, or of any of the indebtedness, or any one who has made any of the advances hereinbefore mentioned, or the party of the third part, may bid and purchase the whole or any part of said premises.

Form 393.

Provision for Payment of Attorney's Fees in Foreclosure.

In any such proceeding to foreclose, he (the mortgagee) shall be allowed a reasonable and just sum to be fixed by the creditor, with which to pay the attorney's and counsel fees in such foreclosure proceedings, in gold coin, which sum shall be secured by this mortgage, and shall become due upon the filing of the complaint.

Form 394.

Mortgagor Entitled to Possession for Default in Payment of Principal or Interest.

In case default be made in the payment of the principal, or of any installment thereof, or of the interest, or of any installment thereof, or of any other indebtedness secured by this mortgage, then the said Mortgagee—, or his assigns shall, at his option, be entitled to the immediate possession of said premises, with the right to manage the same as a Mortgagee in possession, and to collect and apply the net rents towards the payment of the indebtedness secured by this mortgage, and the said Mortgagor— and all persons claiming under him shall, upon demand, in such event, forthwith deliver the possession of said premises to the said Mortgagee— or his assigns.

Form 395.

Power of Sale. By Whom to be Exercised.

It is hereby agreed and declared, that the power of sale and all the powers and rights hereinbefore given to the said mortgagee, his executors, administrators, and assigns, may be exercised by him or them, or the persons or person for the time being entitled to receive the moneys secured by this mortgage and he or they shall be authorized a discharge for the same.

Form 396.

Agreement by Purchaser to Pay Mortgage, and Agreement by Mortgagee to Extend Same.

In consideration of the Mortgagee's agreement hereinafter contained, the purchaser hereby agrees with the Mortgagee that he will pay to the Mortgagor on the ——— day of ——— next, the sum of ——— dollars, part of the principal sum secured by said mortgage; and also during such time as any part of the principal sum of said mortgage shall remain unpaid will pay to the Mortgagee interest on the sum remaining unpaid at the rate therein mentioned, by equal half-yearly payments, on the ——— day of ——— and the ——— day of ——— in every year.

In consideration of the owner's agreement hereinbefore contained the Mortgagee hereby agrees with the owner, that if the owner shall pay each installment of interest on the day on which the same becomes due, or within ——— days thereafter, and shall comply with the agreements and perform the agreements and covenants on the part of the Mortgagor implied or contained in said mortgage, other than the agreements and covenants for the payment of the principal sum and interest therein contained, the Mortgagee will not, before the ——— day of ——— call in the moneys secured by said mortgage or any part thereof.

Form 397.

For Payment of Principal by Installments.

Provided, nevertheless, that if the said grantor, his heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the said grantee, his executors, administrators, or assigns, the sum of ——— dollars, with interest at the rate of ——— per cent. per annum by the installments and in the manner following, that is to say, etc., until the said principal sum shall be fully paid,

and interest on the said sum of ——— dollars, or on so much thereof as shall from time to time remain unpaid, by half-yearly payments on the ——— day of ——— and the ——— day of ——— in each year, then these presents shall be null and void.

Form 398.

Agreement by Mortgagor to Keep in Repair.

That during the continuance of this mortgage the mortgagor will keep and maintain all buildings subject thereto in good and substantial repair; and that if he shall fail or neglect to do so the mortgagee shall have the right at his discretion enter upon the said premises from time to time in order to repair and keep in repair the said buildings without thereby becoming liable as a mortgagee in possession, and that his expenses of so doing paid or incurred by him shall be repaid to by the mortgagor on demand, and until so repaid shall be added to the principal sum secured and bear interest accordingly.

Form 399.

Agreement to Repay Expenses for Prevention of Waste and for Protection of Title.

Also, to secure the repayment, on demand, of any and all sums paid out by parties of the second or third part in intervening in, prosecuting or defending any action or proceeding, whenever, in their judgment, it may be necessary to do so in order to protect the title to said property, or this trust. Also, to secure the repayment by party of the first part, of the expenses incurred for such repairs or prevention of waste upon said premises as may have been deemed necessary by party of the third part or its assigns.

Form 400.

Payment of Present Debt and Future Advances.

Provided nevertheless, that if the said grantor, or his heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the said grantee or his executors, administrators, or assigns, the sum of ——— dollars loaned to him at the time of the execution of these presents, and such further sums of money, not exceeding in all the sum of ——— dollars, as the said grantee may advance to the said grantor, on the security of this mortgage, or which may become owing or payable by the grantor to the grantee

at any time hereafter during the continuance of this mortgage, with interest on said sum, and such further sums from the time the same shall be advanced or become owing or payable as aforesaid, at the rate of ——— per cent. per annum, payable semi-annually, then these presents shall be null and void.

Form 401.

Power Reserved to Mortgagor to Grant Leases.

Provided always, and it is hereby agreed and declared, the said mortgagor, his heirs or assigns, at any time or times before the said mortgagee, his heirs, executors, administrators, or assigns, shall either have sold the whole of the said premises under the power of sale herein contained, or have entered into possession, or foreclosed the quity of redemption thereof, may appoint by way of lease any part, which shall not for the time being have been so sold as aforesaid, of the said premises for any term of years not exceeding ——— years, to take effect in possession, or within ——— calendar months from the date of the lease, but there be reserved on every such lease the best yearly rent or rents that can be reasonably obtained without taking anything in the nature of a fine or premium; there shall be inserted in every such lease a condition of re-entry for nonpayment within a reasonable time, to be therein specified, of the rent or rents thereby reserved, or the breach or non-performance of any covenant or condition therein contained, and on the part of the lessee or lessees, his or their executors, administrators, and assigns, to be observed and performed, and the lessee or lessees shall execute a counterpart or duplicate thereof, and shall thereby covenant for the due payment of the rent or rents thereby reserved, and for keeping the hereditaments comprised in such lease in good and substantial repair. It is also agreed that the said mortgagor, his heirs or assigns, may, at his or their discretion, until such sale or entry or foreclosure as aforesaid, accept the surrender of any lease now or for the time being subsisting upon said premises or any part thereof which shall not, for the time being, have been so sold as aforesaid.

Form 402.

Payment of Debt and Interest.

Provided nevertheless, that if the said grantor, his heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the said grantee, his executors, administrators, or assigns, the sum of ——— dollars in ——— years from this date, with

interest semi-annually at the rate of ——— per cent. per annum, then these presents (as also a promissory note of even date herewith, signed by the said ———, whereby he promises to pay to the said grantee or order the said sum and interest at the times aforesaid) shall be null and void.

Form 403.

Provision for Repayment of Insurance.

Also, to secure the repayment, on demand, of any and all sums paid out by party of the third part, or parties of the second part, for insurance of said premises, or any part thereof, against loss by fire in such amount as they may deem necessary for their security, loss, if any, payable to party of the third part.

Form 404.

Provision for Repayment of Taxes and Incumbrances.

Also, to secure the repayment, on demand, of any sum or sums advanced at any time during the continuance of this trust by party of the third part, for the payment of any taxes, assessments, liens and incumbrances now subsisting, or which may hereafter be levied or imposed upon said premises, or any part thereof, which may, in the judgment of the party of the third part, affect said premises or this trust.

Form 405.

Agreement by Mortgagor to Keep Down Interest on Prior Mortgage.

The said ———, mortgagor, hereby covenants that he, his heirs, executors, and administrators, will at all times during the continuance of this mortgage keep down the interest on a prior mortgage, to which the property hereby mortgaged is subject and whenever requested by the said mortgagee, his agent or assigns, exhibit the receipt for the last payment of interest due on the prior mortgage, and, if required by said mortgagee deliver the said receipt to him.

Form 406.

Agreement by Mortgagor to Insure Property Mortgaged.

That during the continuance of this mortgage, the mortgagor or his assigns will keep the buildings on the premises insured against

loss by fire in the name of the mortgagee, in the sum of ——— dollars, (or two thirds their cash value) and will on demand produce to the mortgagee the policy or policies of insurance (or will immediately deliver to the mortgagee the policy or policies). If the mortgagor shall make or suffer default in procuring such insurance the mortgagee may at his discretion insure and keep insured all or any of the said buildings to the amount aforesaid, and that the expense of such insurance shall be repaid to him by the mortgagor on demand, and until so repaid shall be added to the principal sum secured, and bear interest at the same rate as said principal.

Form 407.

Same. Another Form.

And it is Hereby Further Agreed, That the Mortgagor— shall and will keep the improvements upon the mortgaged premises insured for two-thirds their actual cash value, and will have such insurance made payable to the Mortgagee— as additional security for the payment of the indebtedness secured or which may be secured by this mortgage; and in default of keeping said improvements insured as aforesaid, then said Mortgagee— may cause the same to be insured at the expense of the said Mortgagor; and that the Mortgagor— will, on demand, repay to the Mortgagee—, in gold coin, all moneys paid by the Mortgagee— to obtain said insurance.

Form 408.

Agreement to Increase the Rate of Interest in Mortgage.

Whereas the mortgagor has requested the mortgagee to extend the time of payment of the mortgage debt, and the mortgagee has consented to such extension upon having the rate of interest upon the mortgage debt increased: Now in pursuance of said agreement the mortgagor hereby covenants and agrees with the mortgagee that as from this ——— day of ———, continuing so long as this principal sum secured by said mortgage or any part thereof shall remain owing and unpaid, he will pay to the mortgagee interest at the rate of ——— per cent. per annum, instead of at the rate of ——— per cent. per annum, on the money for the time being remaining owing, up on the days appointed in the mortgage for payment of interest; and it is hereby agreed that the mortgage shall henceforth have effect as if the rate of interest therein had been ——— per cent. per annum instead of ——— per cent. per

annum; but in all other respects the mortgage shall not be affected by these presents.

Form 409.

Declaration that Money Secured Belongs to Mortgagees on Joint Account.

It is hereby agreed and declared by and between the said mortgagees, that the said sum of ——— dollars so paid by them as aforesaid, and secured by this mortgage, was, and that any further sum or sums which may be paid, expended or laid out by them or the survivors of them, in respect of this security, will be, money belonging to them on a joint account in equity as well as in law; and therefore, that the said mortgagees and the survivors and survivor of them shall remain and be entitled in equity as well as at law to the sum of ——— dollars, and interest thereon, hereby secured, and any such further sum or sums which may be paid, expended or laid out as aforesaid, and that the receipt of the survivors or survivor of them, or of the executors or administrator of such survivor, or their or his assigns, shall be a complete and effectual discharge for the same and every part thereof respectively.

Form 410.

Partial or Complete Payment Before Maturity of Mortgage.

The grantor is hereby authorized and allowed to pay the debt hereby secured, or any part of it, not less than ——— dollars at any one time, whenever and at such time and times as he may desire and the mortgagee hereby agrees to accept such payment or payments, and thereupon the interest shall cease upon such part of the debt as may be so paid; and upon the full payment of said debt, with all interest due or owing up to the date of actual payment, he will satisfy and discharge this mortgage.

Form 411.

Provision for Payment of Balance Owing by a Firm to Bankers on Account.

Provided nevertheless, that if the said mortgagors, their heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the mortgagees, their executors, administrators, or assigns, on demand, the balance on account current which shall be for

the time being owing to said mortgagees, in respect or by reason of any bills, notes, or drafts accepted, paid, or discounted, or advances made to or for the use or accommodation of said mortgagors or their said firm, with interest, commissions, and other charges, together with interest on the said balance from the time of such demand being made, at the rate of ——— per cent. per annum, then these presents shall be null and void.

Form 412.

Declaration that Borrower has Notice that Trustees are Stockholders and Officers of Bank.

The party of the first part has full notice that the parties of the second part are stockholders in and officers of the party of the third part, and hereby consent that they act as Trustees and parties of the second part, and waive all objections thereto.

Form 413.

Assignment of Mortgage. New York Form.

Know all men by these presents, that I, ——— of ———, in the county of ——— and state of ———, party of the first part, in consideration of the sum of ——— dollars to me in hand paid by ——— of ———, in the county of ——— and state of ———, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, unto these presents do grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, a certain indenture of mortgage, bearing date the ——— day of ———, 19—, made by ——— of ———, in the county of ——— and state of ———, and which said mortgage was recorded in the clerk's office of the county of ———, on the ——— day of ———, in the year 19—, in book No. ——— of mortgages, at page ———; together with the bond or obligation therein described, and the money due or to grow due thereon, with the interest.

To have and to hold the same unto the said party of the second part, his executors, administrators, or assigns, subject only to the provisos in the said indenture of mortgage contained; and I do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but at his own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money,

and interest, and in case of payment, to discharge the same as fully as I might or could do, if these presents were not made.

In witness, etc.

Form 414.

Same. California Form.

Know all men by these presents: That I, A. B., the party of the first part, for and in consideration of the sum of Ten Dollars, of the United States of America, to me in hand paid by C. D., the party of the second part, the receipt whereof is hereby acknowledged, do ——— by these presents grant, bargain, sell, assign, transfer and set over unto the said party of the second part, a certain Indenture of Mortgage, bearing date the ——— day of ———, one thousand nine hundred and ———, made and executed by E. T., Mortgagor—, to me the said A. B. Mortgagee—, and recorded on the ——— day of ———, 190—, in Book ——— of ———, at page ———, in the office of the County Recorder of the ——— County of ——— State of ———, together with the promissory note therein described, and the money due, and to grow due, thereon, with the interest, and all other claims existing or to arise thereunder.

To have and to hold the same unto the said party of the second part ——— executors, administrators and assigns, for his use and benefit; subject only to the proviso in the said Indenture of Mortgage mentioned. And the said party of the first part do— hereby make, constitute and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but at the proper costs and charges of the said party of the second part, to have, use, and take all lawful ways and means for the recovery of the said money and interest; and in case of payment, to discharge the same as fully as the said part— of the first part might or could do if these presents were not made.

In witness whereof, etc.

..... (SEAL).
..... (SEAL).
..... (SEAL).

Form 415.

Same. New Jersey Form.

Know all men by these presents, that I, ——— of ———, for and in consideration of the sum of ——— dollars lawful money of the United States of America, to me in hand paid by ———

of ——— at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over, unto the said ——— a certain indenture of mortgage, bearing date the ——— day of ———, 19—, made by ———, mortgagor, to me as mortgagee, and recorded in the office of the register of deeds for the county of ———, in book ———, page ———, and the mortgaged premises therein described, with the appurtenances; together with the bond or obligation in said indenture or mortgage mentioned, and thereby intended to be secured, and the warrant of attorney to confess judgment thereto annexed, and all moneys due and to grow due thereon. To have and to hold the same unto the said ———, his heirs, executors, administrators, and assigns, to his and their proper use, benefit, and behoof; subject to the provision or condition of redemption in said indenture of mortgage contained. In witness, etc.

Form 416.

Same. Pennsylvania Form.

Know all men by these presents, that I, ——— of ———, the mortgagee named in the indenture of mortgage hereinafter mentioned, for and in consideration of the sum of ——— dollars lawful money, unto me in hand paid by ——— of ———, at the time of the execution hereof, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, assign, transfer, and set over unto the said ———, his heirs, executors, administrators, and assigns, the indenture of mortgage given and executed by ——— of ———, dated the ——— day of ———, 19—, and recorded in the office for recording of deeds in and for ———, in mortgage book No. ———, page ———; also the bond or obligation in the said indenture of mortgage recited, and all moneys due or to become due thereon, with the warrant of attorney to the said obligation annexed; together with all rights, remedies, and incidents thereunto belonging; and all my right, title, interest, property, claim, and demand in and to the same. To have, hold, receive, and take all and singular the hereditaments and premises hereby granted and assigned, or mentioned and intended so to be, with the appurtenances, unto the said ———, his heirs, executors, administrators, and assigns, to and for his and their only proper use, benefit, and behoof, forever; subject, nevertheless, to the equity of redemption of said ———, the mortgagor, in the said indenture of mortgage named, and his heirs and assigns therein. In witness, etc.

Form 417.

Same. Illinois Form.

Know all men by these presents, that I, ——— of ———, party of the first part, in consideration of the sum of ——— dollars lawful money of the United States of America, to me in hand paid by ——— of ———, the party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, his heirs, executors, administrators, and assigns, a certain indenture of mortgage bearing date the ——— day of ———, 19—, made by ——— to me, and all my right, title, and interest to the premises therein described, as follows, to wit, etc.; which said mortgage is recorded in the recorder's office of the county of ———, in the state of ———, in book No. ——— of mortgages, at page ———; together with the notes therein described, and the money due or to grow due thereon, with the interest: To have and to hold the same unto the said party of the second part, his executors, administrators, or assigns, forever; subject only to the provisos in the said indenture of mortgage contained.

And I do for myself, my heirs, executors, and administrators covenant with the said party of the second part, his heirs, executors, administrators, and assigns, that there is now actually owing on said notes and mortgage, in principal and interest, the sum of ——— dollars, and that I have good right to assign the same.

And I hereby make, constitute, and appoint the said party of the second part my true and lawful attorney irrevocable, in my name or otherwise, but at his own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and, in case of payment, to discharge the same, as fully as I might or could do if these presents were not made. In witness whereof, etc.

Form 418.

Same. Michigan Form.

Know all men by these presents, that ——— of ———, party of the first part, for and in consideration of the sum of ——— dollars to him in hand paid by ——— of ———, party of the second part, at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, as-

signed, transferred, and set over, and by these presents doth **grant,** bargain, sell, assign, transfer, and set over, unto the said party of the second part a certain indenture of mortgage bearing date the ——— day of ———, 19—, and recorded in the register's office of the county of ———, state of Michigan, in liber ——— of mortgages, at page ———, with all and singular the premises therein mentioned and described, together with the note or obligation therein also mentioned, and the moneys now due, and the interest that may hereafter grow due thereon: To have and to hold the same unto the said party of the second part, his heirs and assigns, forever, subject only to the proviso in the said indenture of mortgage mentioned. And he doth hereby authorize and appoint the said party of the second part doth hereby authorize and appoint the said party of the second part his true and lawful attorney, irrevocably, in his name or otherwise, but at his proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the sum or sums of money now due and owing, or hereafter to become due and owing, upon the said note and mortgage; and in case of payment to give acquittance or other sufficient discharge, as fully as he might or could do if these presents were not made; and he doth hereby, for his heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the second part that there is now due upon the said note and mortgage the sum of ——— dollars, and that he hath good right and lawful authority to grant, bargain, and sell the same in manner aforesaid. Sealed and delivered the ——— day of ———, 19—.

Form 419.

Same. Maryland Statutory Form.

I hereby assign the within mortgage to (*the assignee*). Witness my hand and seal this ——— day of ———, 19—.

Form 420.

Massachusetts Form. Assignment of Mortgage.

Know all men by these presents, that I, ——— of ———, the mortgagee named in a certain mortgage given by ——— to me, dated the ——— day of ———, 19—, and recorded with ——— county deeds, lib. ———, fol. ——— in consideration of ——— dollars paid by ——— of ———, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over unto the said ——— the said mortgage deed, the real estate thereby con-

veyed, and the note and claim hereby secured. To have and to hold the same to the said ——— and his heirs or assigns, to his and their own use and behoof, forever, subject, nevertheless, to the conditions therein contained, and to redemption according to law. In witness, etc.

Form 421.

Assignment by Receivers of a Savings Bank.

Know all men by these presents, that we, ——— and ———, receivers of the ——— Savings Bank, the mortgagee named in a certain mortgage given by ——— to said ——— Savings Bank, dated the ——— day of ———, A. D. 19—, and recorded with ——— deeds, lib. ———, fol. ———, in consideration of ——— dollars paid by ——— of ———, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over unto the said ——— the said mortgage deed, the real estate thereby conveyed, and the note and claim thereby secured; but without warranty or covenant of any kind, and without recourse to the said ——— Savings Bank, or to us, or either of us, in any event.

To have and to hold the same to the said ——— and his heirs and assigns, to his and their own use and behoof, forever; subject, nevertheless, to the conditions therein contained and to redemption according to law, but without warranty or covenant as aforesaid. In witness whereof we, the said receivers of the said ——— Savings Bank, have hereunto set our hands and seals, this ——— day of ———, A. D. 19—.

Form 422.

Wisconsin Statutory Form of Assignment.

For value received, I ——— of ———, Wisconsin, hereby assign to ——— of ———, Wisconsin, the within mortgage (*or* a certain mortgage executed to ——— by ——— and wife, of ——— county, Wisconsin, the ——— day of ———, 19—, and recorded in the office of the register of deeds of ——— county, Wisconsin, in vol. ——— of mortgages, on page ———), together with the note and indebtedness therein mentioned. Witness my hand and seal this ——— day of ———, 19—.

Form 423.

Assignment of a Mortgage as Collateral Security.

Know all men by these presents, that I, A. B., the mortgagee named in and present holder of a certain mortgage given by C. D. to ———, dated ———, 19—, and recorded with ——— deeds, book ———, page ———, in consideration of ——— dollars paid by ———, a corporation, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over to the said corporation the said mortgage deed, the note and claim thereby secured, and the real estate thereby conveyed. To have and to hold the same to the said corporation, its successors and assigns, to its own use and behoof, forever; subject, nevertheless, to the condition therein contained and to redemption according to law. This assignment is made as collateral security for a note given by me to said corporation for the sum of ——— dollars, dated ———, 19—, payable in ——— years after date, with interest at the rate of ——— per cent. per annum, payable semi-annually. And I, for myself, my heirs, executors, and administrators, declare, stipulate and agree to and with said corporation, it successors and assigns, that all taxes levied or assessed, whether on the land or on any interest therein, or on the note secured by said mortgage, or on my note above mentioned or otherwise, in respect of said mortgage, mortgage note, or my said note, shall be paid by the mortgagor, or by me, without claim to reimbursement, so that said corporation, its successors and assigns, holders of said mortgage, shall receive the interest specified in said mortgage and in the note of me, said ———, to it, net. And said corporation, its successors and assigns, holders of said mortgage, shall have full right before any default on part of me, the said ———, to foreclose said mortgage in case of any breach in its condition, by sale, entry, or both methods, but shall not be obliged so to do, and, if cash is received by foreclosure, shall not be obliged to put the same at interest. And in case of any default by me in the payment of principal or interest when due and payable respectively on my said note, or in payment of said taxes, or of any part thereof, said corporation, its successors or assigns, holding said mortgage, or holding by foreclosure the real estate described therein or any part thereof, may sell said mortgage and mortgage note, or said real estate, by public auction in said ———, without notice or demand, except giving notice of the time and place of sale once in each of three successive weeks in some one newspaper published in said ———, and in its or their own name or names, or as my attorney for that purpose hereby duly authorized, convey the same absolutely and in fee simple to the purchaser accordingly; and out of the proceeds

of such sale retain all sums then secured by this deed or by my said note (whether then or thereafter payable), with interest and all costs and expenses, and ——— per cent. of the purchase money for the services of the party making the sale, paying the surplus if any to me or to the person thereto entitled on demand; and such sale shall forever bar me, and all persons claiming under me, from all right and interest in the premises, at law and in equity. And it is mutually agreed that the said corporation or its assigns may purchase at said sale, and that no other purchaser shall be answerable for the application of the purchase money. It is also agreed that should said mortgage be not foreclosed or in process of foreclosure at the time of any default by me in punctual payment of interest or principal of my said note to said corporation, or in payment of said taxes, or any part thereof, said corporation, its successors or assigns, may foreclose said mortgage if it deems proper, upon any breach of its condition, or complete any foreclosure begun, and that any foreclosure made or completed after default by me, good against the mortgagor, shall be good against me and those claiming under me, without notice or demand, and shall absolutely bar all my rights to redeem, whether the result of such foreclosure is to vest the title of the real estate in the holders of the mortgage, who are hereby expressly authorized to buy at any foreclosure, or in a third party. Said mortgage has been extended to the ——— day of ———, 19—, by extension to be recorded herewith. In witness whereof I, the said A. B., have hereunto set my hand and seal this ——— day of ———, in the year 19—.

Form 424.

Assignment of Mortgage by Indorsement.

Know all men by these presents, that I, A. B. of ———, in the county of ——— and state of ———, in consideration of ——— dollars paid to me in full satisfaction by C. D. of ———, in the county of ——— and state of ———, do hereby grant, assign, release, transfer, set over, and convey unto the said C. D., his heirs and assigns, forever, the premises within conveyed to me in mortgage, and all my right, title, interest, and estate in, and unto the same and the indebtedness and claims secured thereby. To have and to hold the same to the said ———, his heirs and assigns, forever. In witness, etc.

Form 425.

Extension of Mortgage. Form Used in New York.

This agreement, made this ——— day of ———, in the year one thousand nine hundred and ———, by and between ———, of the first part, and ———, of the second part, witnesseth:

Whereas, ——— executed and delivered to ——— a certain bond and indenture of mortgage, each dated the ——— day of ———, in the year one thousand nine hundred and ———, to secure the payment of ——— dollars, and interest at the rate of ——— per cent. per annum, and recorded in the office of the ——— of the ———, county of ———, in liber ——— of mortgages, page ———, on the ——— day of ———, in the year one thousand nine hundred and ———;

And whereas, the said part— of the first part, now the owner of the premises in said mortgage described, and the said part— of the second part—, the owner— and holder— of said bond and mortgage, and said bond and mortgage by the terms thereof ——— become due and payable ———;

Now this agreement witnesseth, that the said parties hereto, in consideration of the sum of one dollar to each by the other in hand paid, the receipt whereof is hereby acknowledged, do hereby mutually covenant, promise, and agree to and with each other, and their respective heirs, executors, administrators, and assigns, as follows, viz.:

That the time for the payment of said principal sum be and the same is hereby extended to the ——— day of ———, which will be in the year one thousand nine hundred and ———, and that interest thereon shall be computed from and after ——— at the rate of ——— per cent. per annum, and be payable semi-annually on the ——— days of ——— and ——— in each year, until the said principal sum be fully paid and satisfied.

And the said part— of the first part, in consideration of the sum of one dollar, and in consideration of the extension of the payment of the principal sum secured by said mortgage, do— for ——— heirs, executors, administrators, hereby covenant to and with the said part— of the second part, ——— legal representatives and assigns, that ——— will pay the said sum of ——— dollars, secured by said bond and mortgage, on the said ——— day of ———, in the year one thousand nine hundred and ———, and the interest thereon at the time and in the manner provided for in this agreement, in the gold coin of the United States of America.

And the said part— of the first part do— further covenant and agree for ———, heirs and assigns, that ——— will, during all

the time until the money secured by said bond and mortgage shall be fully paid and satisfied, pay all taxes, assessments, and charges, ordinary and extraordinary, that may from time to time, be laid, levied, assessed, or imposed upon said mortgaged premises by any lawful authority, power or government.

And the said parties hereto mutually agree that in case said part— of the first part, ——— heirs or assigns, shall make default in any of the covenants contained in said bond and mortgage, or shall fail or neglect to pay any tax, charge, or assessment that may be imposed or laid upon such mortgaged premises, whilst said money or any part thereof remains unpaid, for a period of two months after the confirmation thereof, or in case the legislature of the state of New York, or any other government or power, shall enact any law imposing a special tax upon bonds or mortgages, or assessing bonds or mortgages separately from other personal property, or in case the said part— of the second part shall become liable to have any sum of money deducted from the principal or interest to become due on said bond or mortgage, or become liable in any way to pay any sum of money whatsover in consequence of any such or similar law, that thereupon the said principal sum of ——— dollars, with all arrearages of interest, shall, at the option of the said part— of the second part, ——— legal representatives or assigns, become and be due and payable immediately, although the time limited for the payment of said principal money may not then have expired, anything herein contained to the contrary notwithstanding. And it is agreed that the failure or omission of said part— of the second part, or ——— legal representatives, to exercise such option in any one or more instances, shall not be construed as a waiver or relinquishment of the right to such option in any other case of default, but that such option shall be and remain in full force and effect.

This agreement is executed by the part— of the second part on the representation of the part— of the first part that ——— the absolute owner of the premises described in said mortgage, and fully authorized to execute these presents so as to bind said premises; and if said representations should be in any respect incorrect, it is expressly agreed that the said part— of the second part may, at ——— option, declare this agreement wholly void, and as if the same had not been made.

In witness whereof, the said party of the ——— part to these presents hereunto set ——— hand— and seal— the day and year first above written.

Sealed and delivered in the presence of ———.

Form 426.

Extension of a Mortgage Held by a Corporation.

Whereas the ——— A. B. Bank, a corporation duly organized under the laws of the state of ———, and established at ———, in said state, is the holder of a certain mortgage made by ——— to ———, dated the ——— day of ———, A. D. 19—, and recorded in ——— registry of deeds, lib. ——— fol. ———, to secure the payment of the sum of ——— dollars in ——— years, with interest at the rate of ——— per cent., payable half-yearly;

And whereas ——— of ———, being now the owner of the right in equity to redeem the said mortgaged premises, has requested the said corporation to grant further time for the payment of the said mortgage debt, and the said corporation has agreed to extend the said time of payment for the term of ——— years from the ——— day of ——— next, with interest payable half-yearly at the rate of ——— per cent. per annum, provided the said ——— and those having his estate in the premises shall, during said term and until said mortgage debt is fully paid, punctually pay the interest on the said mortgage debt, and all taxes and assessments levied on or in respect of the same, and on or in respect of the mortgaged premises or any interest therein, as hereinafter expressed, as the same shall become payable, and shall keep the said premises in good repair and insured against fire according to the terms of the said mortgage deed, and shall not make nor suffer to be made any strip or waste thereof:

Now, therefore, the said ———, in consideration of the agreement of the said corporation, hereby covenants for himself, his heirs, executors, and administrators, with the said corporation and its assigns, that he will not require the said corporation or its assigns, holders of the said mortgage, to receive payment of the said mortgage debt during the said extended term; that he will punctually pay the interest thereon, at the rate of ——— per cent. per annum, as the same shall accrue; that he will keep the said mortgaged premises in good repair and insured against fire, according to the provisions of the said mortgage deed; that until said mortgage debt is fully paid he will punctually pay, without making claim to any reimbursement whatever therefor, all taxes and assessments, to whomsoever levied or assessed, whether on the mortgaged premises, or on any interest therein, or on the debt secured by said mortgage, whether in the nature of a franchise tax levied on or in respect of that portion of the deposits of said institution represented in this mortgage or otherwise, and whether in the nature of taxes and assessments now in being or not; that he will not make nor suffer to be made any strip or waste thereof;

and that at the expiration of the said extended term he will pay the said mortgage debt, with all the accrued interest thereon, together with any moneys paid by the said corporation for taxes, insurance, and other necessary charges on or in respect of the mortgaged premises, or the debt secured by said mortgage.

It is expressly understood and agreed that nothing herein contained shall be construed to impair the security of said corporation, its successors, or assigns, under the mortgage, nor affect nor impair any rights or powers which it or they may have under the note and mortgage for the recovery of the mortgage debt, with interest, in case of nonfulfilment of above covenants. In witness whereof the said ——— has hereto set his hand and seal the ———day of ———, 19—.

Form 427.

Extension of Mortgage where Principal Debt Has Become Due for Default in Payment of Interest.

This agreement made this ——— day of ———, 19—, between ——— of ———, mortgagor of the one part, and ——— of ———, mortgagee, of the other part, witnesseth. Whereas a mortgage dated the ——— day of ———, 19—, and recorded with ——— county deeds, book ———, page ———, was made by said mortgagor to said mortgagee, to secure the payment of the sum of ——— dollars, with interest at the rate of ——— per cent. per annum, payable semi-annually; and whereas default having been made by the said mortgagor in payment of the interest on the said sum on the days appointed for payment thereof, he the said mortgagee, did demand payment of the said principal sum of ——— dollars, and all such interest as might be then due thereon, in accordance with the stipulation in said mortgage contained; and the said mortgagee has now consented and agreed to allow the said principal sum to remain until the expiration of the time mentioned in the said mortgage for the payment of the same, on condition that the said mortgagor shall pay the interest thereon by equal half-yearly payments as hereinafter mentioned: Now the said mortgagor hereby agrees with the said mortgagee, his executors, administrators, and assigns, that he, the said mortgagor, will pay the interest now due on said sum immediately, and will pay the interest to become due on the said principal sum in the manner following, that is to say: the sum of ——— dollars, being interest thereon for six months, on the ——— day of ——— and the ——— day of ——— in each and every year, until the maturity of said mortgage debt. Provided, nevertheless, and it is hereby agreed and declared, that in default of the

punctual payment of the said interest in the manner herein named and agreed to be paid, nothing herein contained shall waive or annul the provision in said mortgage whereby the whole mortgage debt becomes due upon any default in the payment of interest thereon, but the whole mortgage debt shall become immediately due, and the said mortgagee, his executors, administrators, or assigns, may proceed to sell the premises as provided by said mortgage (*or* as provided by law) for the payment of the whole mortgage debt and all interest due thereon. Witness the hands of said parties.

Form 428.

Agreement by mortgagee to postpone sale under mortgage.

This agreement made this ——— day of ——— between ——— of ———, the mortgagee named in a certain mortgage executed by ——— to him, dated the ——— day of ———, 19—, and recorded in the ——— registry of deeds, book ———, page ———, party of the first part; and ——— of ———, the owner of the equity of redemption of said mortgaged premises, party of the second part witnesseth: Whereas, by virtue of a power of sale contained in said mortgage the mortgagee, after having given due notice of sale under the power, has now, at the request of the said owner of the equity of redemption, consented to postpone such sale for the period of ——— months, for the purpose of enabling him, the said owner, to obtain the money for paying off said mortgage, on his making the agreement hereinafter contained: Now, in consideration of the agreement on the part of the said owner hereinafter contained, he, the said mortgagee, hereby agrees with the said owner that he will not, for the space of ——— calendar months from the date hereof, sell, or proceed to offer for sale, under such power, said mortgaged premises, but will permit the owner to occupy and enjoy the same during such period of extension.

The said owner, in consideration of such forbearance, hereby agrees that in case of default of payment of the principal or interest of said mortgage at the expiration of such extended time of payment, he will not in any way hinder or attempt to prevent the sale of the said premises by the said mortgagee, under the power of sale contained in said mortgage. And the said owner agrees that upon request he will execute a good and sufficient conveyance of the mortgaged premises to the said mortgagee, his heirs or assigns, or to such person or persons as he or they may designate; and that he will make such conveyance without a previous sale under the power, if so requested, or, after such sale, will make

such conveyance in confirmation thereof; and in the event of such sale under said power, or in the event of a conveyance in pursuance of this agreement, he will deliver up peaceable possession of the said premises to the purchaser at such sale, or to the grantee under such conveyance.

And the said owner further agrees that, during the period of extension hereby allowed, he will not do or suffer any act to be done which may injure the said premises, but will keep and maintain the same in all respects in good repair and condition. In witness, etc.

Form 429.

Massachusetts form for the extension of the time of payment of mortgage.

This indenture, made the ——— day of ———, 19—, by and between ——— of ———, the holder of a certain promissory note for ——— dollars, executed by ———, and secured by a mortgage of certain real estate in ———, dated the ——— day of, ——— A. D. 19—, and recorded in ——— registry of deeds, lib. ———, fol. ———, party of the first part; and ——— of ———, claiming to own the equity of redemption in said mortgaged premises, of the second part:

Witnesseth, that the said parties, for themselves and their representatives, hereby mutually agree that the time for the payment of the principal of said note and mortgage debt shall be and the same is hereby extended for the term of ——— years from the ——— day of ———, A. D. 19—, and that the same is to bear interest from said date at the rate of ——— per cent. per annum, payable on the ——— day of ——— and the ——— day of ——— in every year, until said principal sum shall be fully paid.

And the said party of the second part hereby covenants and agrees that he will not require the holders of said note and mortgage to receive payment of said mortgage debt during said extended term; that until the same is fully paid he will punctually pay the interest now due, and to grow due thereon, at the times and at the rate aforesaid; that he will keep the mortgaged premises in good repair and insured against fire, and the taxes thereon duly paid, according to the provisions of said mortgage; that he will punctually pay, without making claim to any reimbursement whatever therefor, all taxes and assessments to whomsoever levied or assessed whether on the mortgaged premises or on any interest therein, or on the debt secured by said mortgage, and whether in the nature of taxes and assessments now in being or not, and that at the expiration of said extended term he will

pay the said mortgage debt, with all interest thereon, together with any moneys paid by the holders of said mortgage for taxes, insurance, or other necessary charges, on or in respect of the mortgaged premises or the debt secured by said mortgage.

It is expressly understood and agreed that nothing herein contained shall be construed to impair the security of said party of the first part, his executors, administrators, or assigns, under said mortgage, nor affect nor impair any rights or powers which he may have under the said note and mortgage for the recovery of the mortgage debt, with interest, in case of non-fulfilment of this agreement by said party of the second part. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Form 430.

Another form for extension of time.

This indenture, made the ——— day of ———, A. D. 19—, between ——— of ———, in the state of ———, the holder and owner of a certain mortgage executed by ——— to the said ———, dated ———, 19—, and recorded in ——— registry of deeds, lib. ———, fol. ———, of the first part; and ———, the present owner of the equity of redemption of the estate described in said mortgage, of the second part, witnesseth:

That the said party of the first part, for himself and his executors, administrators, and assigns, covenants with the said party of the second part, and his heirs and assigns, that he, the said party of the first part, or his executors, administrators, or assigns, will not before the ——— day of ———, 19—, demand payment of the principal sum secured by the said mortgage, now remaining due, and that the non-payment thereof before said date shall not be deemed to constitute a breach of the condition of said mortgage: provided, however that from the ——— day of ——— until the said ——— day of ———, 19—, the interest on said principal sum shall be paid annually at the rate of ——— per cent. per annum; that all taxes and assessments, to whomsoever laid or assessed, and whether on the mortgaged premises or any interest therein, or on the debt secured by said mortgage, shall be paid by the party of the second part or his representatives; and that all other things shall be done which, according to the provisions of the condition of said mortgage, were to be done on the part of the mortgagor or of his representatives during the term therein mentioned.

And this indenture further witnesseth, that the said party of the second part, for himself and his heirs and assigns, covenants

with the said party of the first part, and his executors, administrators, and assigns, that he, the said party of the second part, or his heirs or assigns, will not, prior to said ——— day of ———, 19—, require the holder of said mortgage to receive payment of the principal sum secured thereby; and that he will pay the said principal sum and the interest thereon, and the taxes and assessments, as above provided and will pay interest at the same rate as aforesaid and said taxes and assessments for any time, further than that above agreed upon, during which said principal sum may remain unpaid.

In witness, etc.

Form 431.

Discharge by a person to whom by mistake mortgage title had been conveyed.

Whereas a certain mortgage given by A. B. to C. D., dated ———, and recorded with ——— deeds, book ———, page ———, has heretofore been discharged; and whereas the discharge of said mortgage was made by mistake to said A. B., who did not at the time own the equity of redemption in the mortgaged premises, and did not pay the consideration for said discharge, the same having been paid by the owner of said equity at the time of said discharge: Now, therefore, I, for the purpose of rectifying said mistake said A. B., hereby acknowledge that I have no right, title or interest in the premises described in said mortgage, and in consideration of $1.00 and other valuable consideration to me paid by E. F. of ———, in the county of ——— and state of ———, claiming under the mortgagor named in said mortgage, the receipt whereof is hereby acknowledged, do hereby cancel and discharge said mortgage and release and quitclaim unto the said E. F., and his heirs and assigns, the said premises, forever discharged of said mortgage.

Form 432.

Release of possession by mortgagee without discharge.

Whereas I, A. B., the mortgagee named in a certain mortgage deed, dated ———, recorded ———, given by C. D., on ——— lots of land in ———, to secure ——— dollars, on the ——— day of ——— last past made an entry thereof on the mortgaged premises and took possession thereof for breach of condition of said mortgage and for purpose of foreclosing the same; and whereas ———, owner of the equity of redemption of said land,

has paid all expenses, the interest, and so much of principal of said mortgage as is now due, and is in possession of the mortgaged premises, receiving the rents and profits thereof.

Now, I, A. B., the said mortgagee, do, by these presents, certify and acknowledge that I have relinquished to said ——— possession of the mortgaged premises, and that said entry has become void and of no effect, and shall not operate as a foreclosure of said mortgage; it being understood, however, that this acknowledgment is not to be construed as a discharge of said mortgage or as impairing my security for the balance of the mortgage debt, but is intended only as evidence for record that the possession for foreclosure under said entry is released.

Form 433.

Virginia form of release in satisfaction of a deed of trust.

This deed, made this ——— day of ———, 19—, between ——— of ———, and ——— of ———, of the state of ———, parties of the first part; ——— of ———, of the state of ———, of the second part; and ——— of ———, of the state of ———, of the third part. Whereas the said party of the third part, in order to secure to the said party of the second part the payment of the sum of ——— dollars, did, by his deed bearing date on the ——— day of ———, 19—, recorded in the office of the clerk of the county of ———, book ———, page ———, convey to the said parties of the first part, their heirs and assigns, a certain parcel of real estate described in the said deed as follows, etc.; and the said sum of money having been fully paid to the said party of the second part, he, the said party of the second part, has requested that the estate conveyed by the said deed of trust to the said parties of the first part in the said property hereinbefore mentioned and described be now released to him, the said party of the third part: this deed, therefore, witnesseth, that for and in consideration of the premises, as well as of the sum of five dollars, the said parties of the first part, with the consent of the said party of the second part, signified by his signing and sealing this deed, do release to the said party of the third part all his claim upon the said property. Witness the following signatures and seals.

Form 434.

Reconveyance and discharge by indorsement on mortgage.

In consideration of the payment of all moneys owing by the said mortgagor on the within written mortgage, the said mort-

gagee hereby reconveys to the mortgagor the within described mortgaged premises. To hold the same unto the said mortgagor, freed and discharged from all principal and interest thereby secured.

In witness, etc.

Form 435.

Partial release of mortgage.

Know all men by these presents, that we, ——— and ———, both of ———, in the county of ———, trustees under the will of ———, late of said ———, and mortgagees named in a certain mortgage given by ——— of said ——— to us as trustees aforesaid, dated the ——— day of ———, 19—, and recorded with ——— deeds, lib. ———, fol. ———, in consideration of one dollar and other good and sufficient consideration to us paid by said ———, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quitclaim unto the said ——— all the right, title, and interest which we acquired under the aforesaid mortgage in or to that part of the premises therein conveyed, which is described as follows, etc.:

To have and to hold the same to the said ——— and his heirs and assigns, to his and their own use and behoof, forever.

But it is expressly understood that this release shall not in any way affect or impair our right to hold under the said mortgage and as security for the sum remaining due thereon, or to sell, under the power of sale in said mortgage contained, all the remainder of the premises therein conveyed and not hereby released.

In witness whereof, etc.

Form 436.

Same. Another Form.

This indenture, made the ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that whereas ———, by indenture of mortgage bearing date the ——— day of ———, 19—, for the consideration therein named, and to secure the payment of the money therein specified, did convey certain lands and buildings, of which the lands hereinafter described are part, unto ———, party hereto of the first part, which said mortgage was recorded in the office of the recorder of the county of ———, on the ——— day of ———, 19—, in book ———, page ———, and whereas the said party of the first part, at the request of the

said party of the second part, has agreed to give up and release the lands hereinafter described unto the said party of the second part, and to hold and retain the residue of the said mortgaged lands as security for the money remaining due on the said mortgage: Now, therefore, the said party of the first part, in compliance with the terms of the said agreement, and in consideration of one dollar to him paid, the receipt whereof is hereby acknowledged, doth by these presents grant, release, quitclaim, and set over unto the said party of the second part, all that part of the said mortgaged land bounded and described as follows, etc., together with the hereditaments and appurtenances thereto belonging; and all the right, title, and interest of the said party of the first part in and to the same, so that the lands hereby conveyed may be discharged from the said mortgage, and the remainder of the lands in the said mortgage may remain to the said party of the first part as heretofore. To have and to hold the land and premises hereby released and conveyed to the said party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behoof, forever, free, clear, and discharged from all lien and claim under and by virtue of the said indenture of mortgage. In witness, etc.

Form 437.

Same. Michigan form.

Indenture made the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ——— of ———, mortgagee, of the first part, and ——— of ———, mortgagor, of the second part.

Whereas the said ———, party of the second part, by indenture of mortgage bearing date the ——— day of ———, 19—, for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto said ———, party of the first part;

And whereas the said party of the first part, at the request of the said party of the second part, has agreed to give up and surrender the lands hereinafter described unto the said party of the second part, and hold and retain the residue of the mortgaged lands as security for the money remaining due on said mortgage: Now this indenture witnesseth, that the said party of the first part, in pursuance of the said agreement, and in consideration of the sum of ——— dollars to him duly paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, by these presents doth grant, release, quitclaim and set over unto the said party of the second part all that part of the said mortgaged lands bounded and described as follows,

etc.; together with the hereditaments and appurtenances thereto belonging, and all the right, title, and interest of the said party of the first part of, in, and to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgage specified may remain to the said party of the first part, as heretofore: To have and to hold the lands and premises hereby released and conveyed to the said party of the second part, his heirs and assigns, to his and their only proper use, benefit, and behoof, forever. free, clear, and discharged of and from all lien and claim, under and by virtue of the indenture of mortgage aforesaid. In witness, etc.

Form 438.

Pennsylvania form.

To all to whom these presents shall come, I, ——— of ———, send greeting. Whereas ——— of ———, by indenture of mortgage bearing date the ——— day of ———, 19—, and recorded in the office for recording of deeds in and for the county of ———, in mortgage book ———, page ———, granted and conveyed unto me, my heirs and assigns, the premises therein particularly described, to secure the payment of a certain debt or principal sum of ——— dollars lawful money, with interest, as therein mentioned; and whereas the said ———, the mortgagor and present owner of the equity of redemption of said premises, requested me, the said ———, to release the premises hereinafter described, being part of said mortgaged premises, from the lien and operation of the said mortgage: Now, therefore, know ye that I, the said ———, as well in consideration of the premises as of the sum of ——— dollars lawful money to me in hand paid by the said ———, the mortgagor, at the time of the execution hereof, the receipt whereof is hereby acknowledged, have remised, releasd, quitclaimd, exonerated, and discharged, and by these presents, do remise, release, quitclaim, exonerate, and discharge, unto the said ———, his heirs and assigns, all that parcel, etc., being part of the premises in said mortgage described. To hold the same, with the appurtenances, unto the said ———, his heirs and assigns, forever, freed, exonerated, and discharged of and from the lien of said mortgage, and every part thereof. Provided always, nevertheless, that nothing herein contained shall in any wise affect, alter, or diminish the lien or incumbrance of the aforesaid mortgage on the remaining part of said mortgaged premises, or the remedies at law for recovering thereout or against the said ———, the mortgagor, his heirs, executors, administrators, or assigns, the remainder of the principal sum, with interest, secured by said mortgage. In witness whereof, etc.

CHAPTER V.

TRUST DEEDS AND MORTGAGES USED IN THE VARIOUS STATES.

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441. Arkansas. Mortgage containing power of sale.
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500. Wyoming. Statutory form of mortgage deed.
501. Same. Statutory certificate of discharge.
502. Same. Statutory form of deed upon sale under a deed of trust.
503. Same. Statutory form of deed of trust.

Form 439.

ALABAMA: *Mortgage containing power of Sale.*

Know all men by these presents that I, ———, of ——— county and state of ———, for and in consideration of the sum of ——— dollars lawful money of the United States, to me in hand paid by ——— of ———, at and before the sealing and delivery of these presents, the receipts of which is hereby acknowledged, have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, aliene, convey, and confirm, unto the said ———, his heirs and assigns, forever, all that, etc., together with all and singular the tenements, hereditaments, rights, members, privileges, and appurtenances unto the above mentioned and described premises belonging or in any wise appertaining: To have and to hold the above granted and described premises, with the appurtenances, unto the said ———, and to his heirs and assigns, and to his and their sole and proper use, benefit, and behoof, forever; provided always, and these presents are upon the express condition, that if the said ——— shall well and truly pay to the said ——— the sum of ——— dollars on demand, with interest, until paid, at the rate

of ——— per cent. per annum, payable semi-annually, according to the terms of his promissory note of even date with these presents, made to the order of said ———, then these presents shall cease, determine, and be void; otherwise to remain in full force. And the said ——— doth hereby vest the said ———, or his assigns, with full power and authority, upon the happening of a default in the payment of the note above described, to sell all his interest in said premises at public sale, for cash or on credit, giving ——— days' notice in a newspaper published in ———, and the proceeds to apply, first to the payment of the amount due on the said note at the time of sale, and after, of the amount to become due, deducting legal interest and the cost of sale, and if there shall be a surplus, then the balance to be paid over to ———. And I do authorize the said ——— to conduct the sale and to make deed to the purchaser, and the title so made I hereby agree to defend against all persons. Given under my hand and seal, etc.

A mortgage of crops may be included in a mortgage of the land, or may be made a separate chattel mortgage, substantially as follows: To ——— and Company, Bankers:

I, ———, do hereby grant, bargain, sell, and convey unto the said firm the entire crop of cotton, cotton seed, corn, oats, fodder, peas, sugar cane and potatoes which may be grown and raised by me or in which I may have any interest on the plantation in said county, known as the ——— plantation, or on any other place which I or any of my hands may cultivate the present year.

I hereby further agree and promise in consideration of the premises, to execute and sign a printed conveyance of my crops which are now unplanted whenever and as soon as the same are planted, and when requested to do so by the said firm, I also agree that in the event of my death, before the completion or gathering of said crops, or in case I should abandon said crops or fail to comply with any of the provisions of this mortgage and agreement, the said firm may, if they choose, forthwith foreclose the same for the payment of whatever may then be owing to them by me; or they may take charge, control and possession of said crops and lands, and all that appertains to the cultivation of and gathering the same, and may furnish the necessary supplies and labor therefor; and for all such expenditures so made by them and for supplies furnished my family, they shall have a lien upon all of said property and crops to be paid out of the proceeds of the sale of said crops and other property hereby conveyed, and should any litigation arise under this mortgage, during my life or after my death, the proper court in said county shall have jurisdiction of such litigation, notwithstanding I may not then be or have been a resident of said county; and I agree that all costs and

expenses of such litigation, including a reasonable attorneys' fee, shall be paid out of the proceeds of said sales by said firm.

I hereby waive all my exemptions under the constitution and laws of Alabama, for the payment of said indebtedness.

Witness my hand and seal this the ——— day of ———, 19—.

Form 440.

ARIZONA.

Know all men by these presents, that ——— of the county of ———, territory of Arizona, mortgagor, for and in consideration of ——— dollars, to me in hand paid by ———, mortgagee, has granted, sold and conveyed, and by these presents do grant, sell and convey unto the said ——— all that certain premises described as follows, to wit: (*here insert description of property*). To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said ———, mortgagee, his heirs and assigns forever.

And I, the said ———, for the consideration above expressed, do hereby renounce and release to said mortgagee all my right and title or claim to dower in and to the above described lands and premises.

This conveyance is intended as a mortgage to secure the payment of a certain promissory note, in words and figures following, to wit: (*insert copy of note*).

And the said mortgagor agrees and does hereby covenant to keep the buildings thereon insured, in favor of the mortgagee, in a good company, to be selected by the mortgagee, in a sum not less than ———, during the life of this mortgage, and in case said mortgagor fails to secure said insurance, the mortgagee is hereby authorized to procure the same.

And this instrument shall be void if said promissory note,, principal and interest, be well and truly paid when due, according to the tenor and effect thereof. But it is distinctly understood and agreed that if the interest on said promissory note, or the principal thereon, shall not be punctually paid when the same shall become due, as in said promissory note mentioned, then, and in such case, the principal sum of said note, and the interest thereon shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said mortgagee, his heirs, executors, administrators and assigns, for the recovery of the same, either by suit on said note, or on this mortgage and note; and in any suit or other proceedings that may be had for the recovery of said principal sum and interest thereon, it shall and

may be lawful for the said mortgagee, his heirs, executors, administrators or assigns, to include in the judgment that may be recovered, attorney's fees not exceeding ——— per cent. thereon upon the amount found due the plaintiff on said note and this mortgage, or in case of settlement, after suit brought, but before judgment rendered, then ——— per cent. on amount found due at the time of settlement, as well as all payments that the said mortgagee, his heirs, executors, administrators or assigns may be obliged to make for his security, or on account of any taxes, insurance, charges, incumbrances or assessments whatsoever on the said premises, legally laid or made thereon.

Witness my hand this ——— day of ———, A. D. 19—.

Signed, sealed and delivered in the presence of ——— and ———.

Form 441.

ARKANSAS. *Mortgage containing power of sale.*

Know all men by these presents that I, ———, of ———, for and in consideration of the sum of ——— dollars to me in hand paid, and the premises hereinafter set forth, do hereby grant, bargain, and sell unto ——— of ———, and unto his heirs and assigns, forever, the following property, namely: all that, (*insert description of property.*) And I hereby covenant with the said ——— that I will forever warrant and defend the title to said property against all lawful claims. And I, ———, wife of the said ———, do hereby release unto the said ——— all my right of dower and homestead in and to the said lands.

This sale is on condition that whereas I am justly indebted unto said ——— in the sum of ——— dollars, evidenced by one promissory note (*describing it*); now, if I shall pay said moneys at the times and in the manner aforesaid, then the above conveyance shall be null and void; and in case of non-payment, then the said grantee, or his assignee, shall have power to sell said property at public sale, to the highest bidder, for cash, at ———, in the ——— of ———, county of ——— and state of Arkansas, public notice of the time and place of said sale having been first given ——— days, by advertising in some newspaper published in said county; at which sale the said grantee or his assignee may bid and purchase as any third person might do. I hereby authorize the said grantee or his assignee to convey said property to any one purchasing at said sale, and to convey an absolute title thereto, and the recitals of his deed of conveyance shall be taken as *prima facie* true; and the proceeds of said sale shall be applied, first, to payment of all costs and expenses attending said sale; second,

to the payment of said debt and interest; and the remainder, if any, shall be paid to said grantor. We hereby waive any and all rights of appraisement or redemption under the laws of the state of Arkansas, and especially of redemption under the act of the general assembly of the state of Arkansas, approved May 8, 1899. In witness, etc.

Form 442.

CALIFORNIA. *Conveyance as mortgage.*

This indenture, made the ——— day of ———, 19—, between ———, party of the first part, and ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars lawful money of the United States of America, to him in hand paid, does by these presents grant, bargain, sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns, forever, all that certain piece or parcel of land situate in ———, county of ———, state of ———, bounded and described as follows, (*insert description*), together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining. This conveyance is intended as a mortgage to secure the payment of ——— dollars (*set out time of payment, interest, etc., and whether evidenced by a note or bond*), and these presents shall be void if such payment be made (according to the tenor and effect thereof). But in case default be made in the payment of the principal or interest as herein provided, then the said party of the second part, his executors, administrators, and assigns, are hereby empowered to sell the said premises with all and every of the appurtenances, or any part thereof, in the manner prescribed by law; and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of such sale, and ——— per cent. for attorney's fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns. In witness, etc.

Form 443.

Same. Mortgage securing promissory note and counsel fees.

This indenture, made the ——— day of ———, 19—, between ———, party of the first part, and ———, party of the second part, witnesseth, that the said party of he first part is justly indebted to the said party of the second part in the sum of ———

dollars lawful money of the United States, upon a promissory note made at the date hereof by ———, in the words and figures following to wit:

$———. San Francisco, November ———, 19—.

——— years after date, without grace, I promise to pay to ———, or order, the sum of ——— dollars, for value received, with interest thereon, at the rate of ——— per cent. per annum, payable semi-annually from this date until paid.

Now this indenture witnesseth, that for the purpose of securing the payment of the said promissory note and the interest thereon as it shall become due and payable, the said party of the first part, for and in consideration of the premises, as also in consideration of the sum of one dollar lawful money to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth hereby grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, all that, etc. To have and to hold the said premises, with all the tenements, hereditaments, and appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns, forever. Provided, nevertheless, that if the said party of the first part shall well and truly pay or cause to be paid the said promissory note, with the interest as it shall become due and payable thereon, according to the tenor and effect thereof, then this indenture and the estate hereby granted shall be null and void, else to remain in full force and virtue. But it is distinctly understood and agreed that if the interest on said promissory note, or the principal thereof, shall not be punctually paid when the same becomes due and payable, as in said promissory note mentioned, then and in such case the principal sum of said promissory note and the interest shall be deemed and taken to be wholly due and payable, and proceedings may forthwith be had by the said party of the second part, his heirs, executors, administrators, or assigns, for the recovery of the same, either by suit on said note or on this mortgage; anything in said note or in this indenture contained to the contrary thereof notwithstanding. And if any suit or other proceedings that may be had for the recovery of the said principal sum and interest on either said note or this mortgage, it shall and may be lawful for the said party of the second part, his heirs, executors, administrators, or assigns, to include in the judgment that may be recovered counsel fees and charges of attorneys, and counsel employed in such foreclosure suit, not exceeding ——— dollars, and ——— per cent. thereon, upon the amount due the plaintiff on said note and this mortgage; and if said suit is settled before judgment, the same fee and percentage shall be allowed, as well as all payments that

the said party of the second part, his heirs, executors, administrators, or assigns, may make for his or their security, or on account of any taxes, charges, incumbrances, or assessments whatsoever on the said premises. In witness, etc.

Form 444.

Same. Statutory form.

This mortgage, made the ——— day of ———, 19—, by ——— of ———, mortgagor, to ——— of ———, mortgagee, witnesseth, that the mortgagor mortgages to the mortgagee (*here describe property*), as security for the payment to him of ——— dollars, on (*or* before) the ——— day of ———, in the year ———, with interest thereon (*or* as security for the payment of an obligation), (*describing it, etc.*)

Form 445.

COLORADO. *Mortgage.*

This indenture, made this ——— day of ———, 19—, between ———, of the first part, and ———, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars to ——— in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following described lot or parcel of land, namely, etc.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining; and all the estate, right, title interest, and claim whatsoever, of the said party of the first part, either in law or equity, to the proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever. And the said party of the first part, the aforesaid tract or parcel of land and premises unto the said party if the second part, his heirs and assigns, against the claim or claims of all and every person whomsoever, does and will warrant and forever defend by these presents.

Provided always, that these presents are upon this express condition, that if the said party of the first part, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid,

to the said party of the second part, his heirs, executors, administrators, or assigns, the sum of ——— dollars in manner particularly specified in a certain promissory note bearing even date herewith, executed by the said party of the first part to the said party of the second part, then and thenceforth these presents, and everything herein contained, shall cease and be void, everything herein contained to the contrary notwithstanding. In witness, etc.

Form 446.

CONNECTICUT. *Mortgage.*

To all people to whom these presents shall come, greeting: Know ye that I, ——— of ———, in the county of ——— and state of ———, for the consideration of ——— dollars, received to my full satisfaction of ——— of ———, in the county of ——— and state of ———, do give, grant, bargain, sell and confirm unto the said ——— all that parcel of land, etc.: To have and to hold the above granted and bargained premises, with the appurtenances thereof, unto the said grantee, his heirs and assigns, forever, to his and their proper use and behoof. And also the said grantor doth for himself, his heirs, executors, and administrators, covenant with the said grantee, his heirs and assigns, that at and until the ensealing of these presents he is well seized of the premises as a good, indefeasible state in fee simple, and has good right to bargain and sell the same in manner and form as is above written; and that the same is free from all incumbrances whatsoever. And furthermore, I, the said grantor, do, by these presents, bind myself and my heirs forever to warrant and defend the above granted and bargained premises to the said grantee, his heirs and assigns, against all claims and demands whatsoever.

The condition of this deed is such that whereas the said grantor is justly indebted to the said grantee in the sum of ——— dollars, as evidenced by a promissory note dated the ——— day of ———, 19—, payable to said grantee, or order, on demand, for value received, with interest at the rate of ——— per cent. per annum: Now if the said note shall be paid according to its tenor, and all money expended by the grantee for insurance and taxes on said premises, then this deed shall be void; otherwise to be and remain in full force and effect. In witness, etc.

Form 447.

DELAWARE. *Mortgage.*

Indenture made the ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———,

party of the second part. Whereas the said party of the first part in and by a certain obligation or writing obligatory under his hand and seal, bearing even date herewith, stands bound unto the said party of the second part in the sum of ——— dollars lawful money of the United States, conditioned for the payment of the sum of ——— dollars, as by reference to the said obligation and condition thereof will appear:

Now this indenture witnesseth, that the said party of the first part, for and in consideration of the aforesaid debt or sum of ——— dollars, and for the better securing the payment of the same, with interest as aforesaid, unto the said party of the second part, his executors, administrators, and assigns, in discharge of the said recited obligation, as also if the further sum of one dollar to the said party of the first part now paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, and confirmed, and by these presents doth grant, bargain, sell, release, and confirm, unto the said party of the second part, his heirs and assigns, all that certain real property, etc.; together with all and singular the improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, rents, issues, and profits thereof.

To have and to hold the said improvements, hereditaments, and premises hereby granted, or mentioned, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use and behoof of the said party of the second part, his heirs and assigns, to the only proper use and behoof of the said party of the second part, his heirs and assigns, forever.

Provided always, nevertheless, that if the said party of the first part, his heirs, executors, administrators, or assigns, shall and do well and truly pay, or cause to be paid, unto the said party of the second part, his executors, administrators or assigns, the aforesaid debt or sum of ——— dollars on the day and at the time hereinbefore mentioned and appointed for the payment thereof, with interest, according to the condition of the said recited obligation, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of anything, for or in respect of any taxes, charges, or assessments whatsoever, that then and from thenceforth as well this present indenture and the estate hereby granted as the said recited obligation shall cease, determine, and become absolutely void and if no effect, anything hereinbefore contained to the contrary in any wise notwithstanding. In witness, etc.

Form 448.

DISTRICT OF COLUMBIA. *Statutory form of mortgage with or without power of sale.*

This mortgage, made this ——— day of ———, in the year ———, witnesseth that whereas I, ——— of ———, am indebted unto ———, of ———, in the sum of ———, payable ———, for which I have given to said ——— (*describe note or bond, or other instrument to be secured*). Now, in consideration thereof, I hereby grant unto the said ——— all that (*describe property to be mortgaged*), provided that if I shall punctually pay said notes or other instruments according to the tenor thereof, then this mortgage shall be void. And if I shall make default in such payment, the said ——— is hereby authorized and empowered to sell said property at public auction on the following terms (*here insert them*), and out of the proceeds of sale to retain whatever shall remain unpaid on my said indebtedness and the costs of such sale, and the surplus, if any, to pay to me.

Given under my hand and seal.

——— (Seal.)

Form 449.

FLORIDA. *Mortgage.*

Indenture made the ——— day of ———, 19—, between ———, of the first part, and ———, of the second part. Whereas, the said ——— is justly indebted to ———, party of the second part, in the sum of ——— dollars, lawful money of the United States, as evidenced by ——— promissory note of even date herewith, drawn by ———, to the order of ———, and payable in ——— years from date thereof, with interest at the rate of ——— per cent. per annum: Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in said note, and also for and in consideration of the sum of one dollar to ——— in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, aliene, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all that certain real property, etc.; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion

and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title interest, property, possession, claim, and demand whatsoever, as well in law is in equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above granted and described premises unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof, forever: provided always, and these presents are on this express condition, that if the said party of the first part, his heirs, executors, administrators, or assigns, shall pay the said sum of ——— dollars, with interest, according to the true intent and meaning of said promissory note, together with all costs, charges, and expenses which the said party of the second part may incur or be put to in collecting the same by foreclosure, that then these presents, and the estate hereby granted, shall cease, determine, and be absolutly null and void. And the said party of the first part, for himself and his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, his heirs, executors, administrators, or assigns, the said debt and all costs, charges, and expenses the party of the second part may incur or be put to in collecting the same by foreclosure. In witness whereof, etc.

Form 450.

GEORGIA. *Mortgage.*

This indenture, made this ——— day of ———, 19—, between ———, of the county of ——— and state of Georgia, of the one part, and ———, of the county of ——— and state of ———, of the other part, witnesseth, that the said ——— has made and delivered to the said ——— a certain promissory note, subscribed with his hand and bearing date this ——— day of ———, 19—, whereby the said ——— hath promised to pay the said ———, or to his order, ——— dollars, in ——— years from this date, for value received: Now, for and in consideration of the sum of ——— dollars, by the said party of the second part to the said party of the first part, in hand paid, the receipt whereof is hereby acknowledged, as well as for the better securing the payment of the aforesaid promissory note, the said ——— has granted, bargained, and sold, and doth by these presents grant, bargain, sell, and convey, unto the said ———, his heirs and assigns, all that certain real property, etc., with all the rights, members, and appurtenances to the same belonging or in any wise appertaining: To have and to hold said

bargained property to the said ———, his heirs and assigns, to his and their own proper use, benefit, and behoof, forever. And the said ———, for himself, his heirs, executors, and administrators, the said bargained property unto the said ——— will warrant and forever defend against the claim of himself and his heirs, and against the claim of all other persons whomsoever.

Provided, nevertheless, that if the said ———, his heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid, unto the said ———, his heirs and assigns, the sum of money in said note specified, and interest that may accrue thereon, on the day and at the time mentioned and appointed for the payment thereof in the said promissory note mentioned, with lawful interest for the same, according to the tenor and effect of said note, then and thenceforth, as well this present indenture, and the right to the property thereby conveyed, as the said promissory note, shall cease, determine, and be void to all intents and purposes. In testimony, etc.

Form 451.

IDAHO. *See California forms.*

Form 452.

ILLINOIS. *Mortgage generally used.*

This indenture witnesseth, that the mortgagor, of the ———, of the county of ——— and state of Illinois, mortgages and warrants to ——— of the county of ———, in the state of Illinois, to secure the payment of ——— dollars, payable as follows, to wit: ——— with interest at the rate of ——— per cent. per annum, payable ——— annually, according to the tenor and effect of a certain promissory note of even date herewith, payable to the order of said mortgagee and signed by said mortgagor, ——— all the following real estate, to wit: ——— situated in the county of ——— and state of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the state of Illinois, and all right to retain possession of said premises after any default in or breach of any of the covenants, agreements or provisions herein contained.

And it is further provided and agreed, that if default be made in the payment of the said promissory note (or any of them) or any part thereof, or the interest thereon, or any part thereof, when due, or in case of waste or non-payment of taxes or assessments, or neglect to procure or renew insurance, as hereinafter provided, then and in such case the whole of said principal and

interest secured by the said note in this mortgage mentioned shall thereupon, at the option of the holder of said note, become immediately due and payable; anything herein or in said promissory note contained to the contrary notwithstanding; and this mortgage may, without notice to the said mortgagor of said option or election, be immediately foreclosed; and it shall be lawful for said mortgagee, his agents or attorneys, to enter into and upon said premises, and to receive all rents, issues and profits thereof, the same when collected, after the deduction of reasonable expenses, to be applied upon the indebtedness secured hereby.

And the said mortgagor further covenants and agrees, to and with the said mortgagee, that he will in the meantime pay all taxes and assessments on the said premises, and will, as a further security for the payment of said indebtedness, keep all buildings that may at any time be upon said premises insured in some reliable company up to the insurable value thereof, or up to the amount remaining unpaid of the said indebtedness, by suitable policies, payable, in case of loss, to the said mortgagee, and deliver to him all policies of insurance thereon as soon as effected, and all renewal certificates therefor; and said mortgagee shall have the right to collect, receive and receipt, in the name of said mortgagor or otherwise, for any and all moneys that may become payable and collectible upon any of such policies of insurance by reason of damage to or destruction of said buildings, or any of them, and apply the same, less his reasonable expenses in obtaining such money, in satisfaction of the money secured hereby; or, in case said mortgagee shall so elect, may use the same in repairing or rebuilding such buildings; and in case of refusal or neglect of said mortgagor to thus insure, or deliver such policies, or to pay taxes, said mortgagee may procure such insurance, or pay such taxes, and all moneys thus paid shall be secured hereby, and shall bear interest at seven per cent., and be paid out of the proceeds of the sale of said premises or out of such insurance money, if not otherwise paid by said mortgagor.

And said mortgagor further agrees that in case of default in the payment of the interest on said note when it becomes due and payable, it shall bear like interest with the principal of said note.

And it is further expressly agreed, by and between said mortgagor and mortgagee, that if default be made in the payment of said promissory notes or any of them, or any part thereof, or the interest thereon, or any part thereof, when due; or in case of a breach in any of the covenants or agreements herein contained; or in case said mortgagee is made a party to any suit by reason of the existence of this mortgage, then or in any of such cases said mortgagor shall at once owe said mortgagee his reasonable attorney's or solicitor's fees for protecting his interest in such suit and

for the collection of the amount due and secured by this mortgage, whether by foreclosure proceeding or otherwise, and a lien is hereby given upon said premises for such fees; and in case of foreclosure hereof, a decree shall be entered for such reasonable fees, together with whatever other indebtedness may be due and secured hereby.

And it is further mutually understood and agreed, by and between the parties hereto, that the covenants, agreements and provisions herein contained shall apply to, and, as far as the law allows, be binding upon and be for the benefit of the heirs, executors, administrators and assigns of the said parties respectively.

In witness whereof, the said mortgagor has hereunto set his hand and seal this ——— day of ———, A. D. 19—.

Form 453.

Same. Statutory Form.[1]

The mortgagor (*here insert name or names*) mortgages and warrants to (*here insert name or names of mortgagee or mortgagees*), to secure the payment of (*here recite the indebtedness to be secured*), the following described real estate (*here insert description thereof*), situate in the county of ———, in the state of Illinois. Dated this ——— day of ———, 19—.

[1]R. S. 1908, c. 30, § 11.

Form 454.

INDIANA: *Short Form of Mortgage.*

This indenture witnesseth, that ———, of ——— county, in the state of ———, mortgages and warrants to ———, of ——— county, in the state of ———, the following real estate, namely, all that, etc., to secure the payment, when it shall become due, of ——— dollars, being the unpaid balance of the purchase money for the above described real estate, and the mortgagor expressly agrees to pay the sum of money above secured without relief from valuation or appraisement laws. In witness, etc.

Form 455.

Same. Statutory Form of Mortgage.

A. B. mortgages and warrants to C. D. (*here describe the premises*), to secure the repayment of (*here recite the sum for which the mortgage is granted, or the notes or other evidences of debt,*

or a description thereof, to be secured, also the date of the repayment.)

Form 456.

Iowa: *Mortgage Securing Counsel Fees.*

This indenture, made the ——— day of ———, A. D. 19—, between ———, of ——— county and state of ———, of the first part, and ———, of ——— county and state of ———, of the second part, witnesseth, that the said party of the first part, for the consideration of ——— dollars, the receipt whereof is hereby acknowledged, doth by these presents grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns, forever, the following described real estate, lying and being situated in the county of ——— and state of Iowa, namely, etc. To have and to hold the premises above described, with all the appurtenances thereunto belonging, unto the said party of the second part, and to his heirs and assigns forever; the said party of the first part hereby covenanting that the above described premises are free from any incumbrance, and will warrant and defend the title unto the said party of the second part, his heirs and assigns, against all persons whomsoever lawfully claiming the same. Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, or administrators, shall pay or cause to be paid to the said party of the second part, his executors, administrators, or assigns, the sum of ——— dollars on the ——— day of ———, 19—, and ——— dollars on the ——— day of ———, 19—, with interest thereon, according to the tenor and effect of the two promissory notes of the said party of the first part, payable to the said party of the second part, bearing even date herewith, then these presents to be void, otherwise to remain in full force. And it is further agreed, if default shall be made in the payment of said sums of money or any part thereof, principal or interest, or if the taxes assessed on the above described real estate shall remain unpaid for the space of three months after the same are due and payable, then the whole indebtedness shall become due, and the said party of the second part, his heirs or assigns, may proceed by foreclosure, or in any other lawful mode, to make the amount of said notes, together with all interest and costs, and all taxes and assessments accrued on said real estate, together with a reasonable fee for plaintiff's attorney, out of the aforesaid real estate. And ———, wife of the said ———, hereby relinquishes her right of dower in the real estate herein mentioned, subject to the above reservations and conditions. In testimony, etc.

Form 457.

IOWA: *Statutory Form of Mortgage.*

For the consideration of ——— dollars I convey to ——— the following described tract of land, and I warrant the title against all persons whomsoever. To be void upon conditions that I pay, etc.

Form 458.

KANSAS: *Statutory Form of Mortgage.*

———mortgages and warrants to ——— (*here describe the premises*), to secure the payment of (*here insert the sum for which the mortgage is granted, or the notes or other evidences of debt, or description thereof, to be secured, also the date of payment*).

Form 459.

KENTUCKY: *Mortgage.*

This indenture, made and entered into this ——— day of ———, 19—, between ——— of ———, in the county of ——— and state of ———, of the first part, and ——— of ——— in the county of ——— and state of ———, of the second part, witnesseth, that the party of the first part, for and in consideration of his indebtedness to the party of the second part, as follows: the sum of ——— dollars, payable in ——— years from this date, with interest thereon at the rate of ——— per cent. per annum, payable semi-annually, as evidenced by his promissory note of even date herewith; and to secure the payment of the same, the said party of the first part has granted, bargained, and sold, and by these presents doth grant, bargain, and sell, to the prty of the second part, all that etc. To have and to hold to said party of the second part, his heirs and assigns, forever, with general warranty.

This indenture is conditioned as follows:—

Whereas the said party of the first part is indebted to the said party of the second part as aforesaid: Now, if said party of the first part shall pay said indebtedness at maturity, then this indenture shall be void, else remain in full force. And should said indebtedness, or any part thereof, be collected by legal or equitable proceedings, or be paid after the institution of such proceedings, then said party of the first part shall pay all expenses of collection, including reasonable attorney's fees and commission incurred by

the party of the second part or his assigns, and which he or his assigns may have paid or be liable to pay on account of such legal or equitable proceedings. And it is expressly stipulated and agreed that the lien of this mortgage shall extend to and include such expenses, attorney's fees, and commission, and that the same shall be included in any judgment or decree rendered for a foreclosure of this mortgage. Witness the hand and seal of the said party of the first part the day and year first above written.

Form 460.

MAINE: *Mortgage Deed.*

Know all men by these presents that I, ——— of ———, in the county of ——— and state of ———, in consideration of ——— dollars paid by ——— of said ———, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell, and convey unto the said ———, his heirs and assigns, forever, all that parcel of land, etc. To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said ———, his heirs and assigns, to their use and behoof forever. And I do covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the premises, and they are free of all incumbrance; that I have good right to sell and convey the same to the said grantee to hold as aforesaid; and that I and my heirs shall and will warrant and defend the same to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

Provided, nevertheless, that if I, the said ———, my heirs, executors, administrators, or assigns, the sum of ——— dollars, in ——— years from the day of the date hereof, with interest on said sum at the rate of ——— per centum per annum, payable semi-annually, until said sum is wholly paid, then this deed, as also one certain promissory note bearing even date with these presents, given by me, the said ———, to the said ———, or his order, to pay the sum and interest at the time aforesaid, shall both be void; otherwise shall remain in full force. And I, the said grantor, hereby covenant and agree with the said grantee, that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after commencement of foreclosure proceedings in any mode prescribed by statute for the foreclosure of mortgages on real estate.

In witness whereof I, the said grantor, and I, ———, wife of the said grantor, in testimony of my relinquishment of all my right of dower in the above described premises, have hereunto set our hands and seals this ——— day of ———, 19—.

Form 461.

MARYLAND: *Statutory Form of Mortgage.*

This mortgage, made this ——— day of ———, by me, ———, witnesseth, that in consideration of the sum of ——— dollars now due from me the said ——— to ———, I, the said ———, do grant unto the said ——— (*here describe property*); provided that if I, the said ———, shall pay on or before the ——— day of ——— to the said ——— the sum of ——— dollars, with the interest thereon from ———, then the mortgage shall be void. Witness my hand and seal.

Form 462.

MARYLAND: *Statutory Form of Deed of Trust.*

This deed, made this ——— day of ———, in the year ———, by me, ———, witnesseth, that whereas (*insert the consideration for making the deed*) I, the said ———, do grant unto ———, as trustee, the following property (*insert description of property*), in trust for the following purposes (*here insert the purposes of the trust, and any covenant agreed upon*). Witness my hand and seal.

Form 463.

MASSACHUSETTS: *Mortgage, with Power of Sale.*

Know all men by these presents that I, ——— of ———, in the county of ——— and state of ———, in consideration of ——— dollars to me paid by ——— of ———, in the county of ——— and state of ———, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said ——— all that parcel, etc.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said ——— and his heirs and assigns, to their own use and behoof, forever.

And I hereby for myself and my heirs, executors, and administrators, covenant with the grantee and his heirs and assigns, that I am lawfully seized in fee simple of the granted premises; that they are free from all incumbrances; that I have a good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons.

Provided, nevertheless, that if I, or my heirs, executors, admin-

istrators, or asigns, shall pay unto the grantee, or his executors, administrators, or assigns, the sum of ——— dollars in ——— years from this date, with interest semi-annually at the rate of ——— per cent. per annum, and until such payment shall pay all taxes and assessments, to whomsoever laid or assessed, whether on the granted premises or on any interest therein, or on the debt secured hereby; shall keep the buildings on said premises insured against fire in a sum not less than ——— dollars, for the benefit of the grantee, and his executors, administrators, and assigns, in such form and at such insurance offices as they shall approve; and shall not permit or suffer any strip or waste of the granted premises, or any breach of any covenant herein contained; then this deed, as also one note of even date herewith, signed by me, whereby I promise to pay to the grantee or order the said principal and instalments of interest at the times aforesaid, shall be void.

But upon any default in the performance or observance of the foregoing condition, the grantee, or his executors, administrators, or assigns, may sell the granted premises, or such portion thereof as may remain subject to this mortgage in case of any partial release hereof, together with all improvements that may be thereon, by public auction, in said ———, first publishing a notice of the time and place of sale once each week for three successive weeks, in some one newspaper published in said ———, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar me and all persons claiming under me from all right and interest in the granted premises, whether at law or in equity. And out of money arising from such sale the grantee or his representatives shall be entitled to retain all sums then secured by this deed, whether then or thereafter payable, including all costs, charges, and expenses incurred or sustained by them by reason of any default in the performance or observance of the said condition, rendering the surplus, if any, to me, or my heirs or assigns; and I hereby, for myself and my heirs and assigns, covenant with the grantee and his heirs, executors, administrators, and assigns, that, in case a sale shall be made under the foregoing power, I or they will upon request execute, acknowledge, and deliver to the purchaser or purchasers a deed or deeds of release confirming such sale.

And it is agreed that the grantee, or his executors, administrators, or assigns, or any person or persons in their behalf, may purchase at any sale made as aforesaid, and that no other purchaser shall be answerable for the application of the purchase money; and that, until default in the performance or observance of the condition of this deed, I and my heirs and assigns may hold

and enjoy the granted premises, and receive the rents and profits thereof.

And for the consideration aforesaid I, ———, wife of said ———, do hereby release unto the said grantee and his heirs and assigns all right of or to both dower and homestead in the granted premises.

In witness whereof we, the said ——— and ———, hereunto set our hands and seals this ——— day of ———, 19—.

Form 464.

MICHIGAN: *Mortgage, with Power of Sale.*

This indenture, made the ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ——— dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released, enfeoffed, and confirmed, and by these presents doth grant, bargain, sell, remise, release, enfeoff, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land situated in the city or town of ———, in the county of ———, and state of ———, and described as follows, etc.; together with the hereditaments and appurtenances thereto belonging or in any wise appertaining: To have and to hold the above bargained premises unto the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

Provided always, and these presents are upon this express condition, that if the said party of the first part shall and do well and truly pay, or cause to be paid, the said party of the second part, the sum of ——— dollars in ——— years from date hereof, with interest thereon at the rate of ——— per cent. per annum, payable semi-annually, according to the terms of the promissory note bearing even date herewith, executed by said party of the first part to the said party of the second part as collateral security, then these presents and said promissory note shall cease and be null and void.

And the said party of the first part hereby covenants and agrees to pay to the said party of the second part the money aforesaid. But in case of non-payment of the said sum of money and the interest, or any part thereof, at the time, in the manner, and at the place above limited and specified for the payment thereof, then the interest thereon shall become principal, and draw interest at the rate aforesaid until paid; and in case of non-payment of any prin-

cipal or interest at the time limited therefor, then, after ——— days, the whole amount shall become due and payable, and it shall and may be lawful for the said party of the second part, his heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchase or purchasers, his heirs and assigns, forever, good, ample, and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided, rendering the surplus moneys (if any there should be) to the said party of the first part, his heirs, executors, or administrators, after deducting the costs, fee, and charges of such proceeding, vendue, and sale aforesaid; and the said party of the first part covenants and agrees to pay to the said party of the second part, and his assigns, the costs and charges aforesaid, and also ——— dollars, as an attorney's or solicitor's fee, should any proceedings be taken to foreclose this indenture at law or in equity, over and above all legally taxed costs.

In witness whereof the party of the first part hath hereto set his hand and seal the day and year first above written.

Form 465.

Same. Trust Deed.

This indenture, made this ——— day of ———, 19—, between ——— and ——— his wife, of the city or town of ———, county of ——— and state of ———, parties of the first part, and ———, of the town of ———, county of ——— in the state of ———, trustee for those holding the obligations secured by this instrument, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of——— dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, remise, release, enfeoff, and confirm, unto the said party of the second part, his heirs, assigns, or successors, forever, all that certain piece or parcel of land situated in the town of ———, in the county of ——— and state of ———, and described as follows, etc.; together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining: To have and to hold the above granted premises and property unto the said party of the second part, his heirs or assigns, or his successor in this trust or his assigns, to their sole and proper use, benefit, and behoof, forever.

Provided, always, and these presents are upon the express con-

dition, that whereas the said ———, one of the parties of the first part, is justly indebted to the said party of the second part in the principal sum of ——— dollars lawful money, being for a loan made to him on the day of the date hereof by the party of the second part, and for which he, the said ———, hath executed ——— notes of the denomination of ——— dollars each, with coupons attached, bearing date herewith, and delivered the same to the party of the second part, and bearing interest at the rate of ——— per cent. per annum, and the principal sum of which said notes is payable on the ——— day of ———, in the year 19—, with interest thereon at the rate of ——— per cent. per annum, payable on the ——— day of ——— and ——— day of ——— in each and every year thereafter, until the principal sum shall be paid, according to the tenor and effect of coupon interest notes attached to the said notes, at the office of said party of the second part, in the town of ———, in the state of Michigan; all which said ——— of the first part hereby covenants and agrees with said party of the second part to do; and also likewise covenants with the said party of the said second part to pay any and all taxes and assessments and charges that may hereafter be a lien or assessed on said premises; and will also keep said premises insured in one or more good and responsible insurance companies, and in an amount and manner approved by said party of the second part, and as a further security for said above loan; and in default thereof it shall be lawful for said party of the second part so to insure said premises, and the premium paid therefor shall be a lien on said premises and this mortgage, to be added to the amount secured by these presents, and payable forthwith, with the interest, at the rate of ——— per cent.; and in case the said parties of the first part shall make default in paying any or all taxes and assessments levied or assessed on said property, and the same shall be paid by the said party of the second part, the amount thereof shall become a lien and be collectible under this instrument in the same manner as is above provided in case of unpaid insurance premiums.

Now, therefore, in case of the non-payment of any or all of said sums of principal or interest at the time, in the manner, or at the place above limited and specified for the payment thereof, or of the amount of insurance or taxes, or in case default be made in any one of the conditions in said note or in this instrument expressed, then and in such case it shall and may be lawful for the said party of the second part, his successors, representatives, or assigns (and the said parties of the first part do hereby empower and authorize him), to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his heirs or assigns, forever, good, ample, and sufficient

deed or deeds of conveyance in law, pursuant to the statute in such case made and provided, and out of the proceeds of such sale to retain the principal and interest of all sums then due, the costs and charges of such vendue and sale, including an attorney's or solicitor's fee of ——— dollars, which said ——— of the first part agrees to pay, as often as any proceedings are taken to foreclose this mortgage either by virtue of the power of sale herein contained or in chancery, in addition to all other legal costs, rendering the surplus moneys (if any there should be) to the said parties of the first part, their heirs or representatives.

And it is herein expressly agreed that in case default shall be made in the payment of the principal or interest, or of any part thereof, as herein stipulated to be made, and the same shall remain in default and unpaid for the space of thirty days, then any and all of said principal sums of money expressed in or represented by said note as shall then remain unpaid, with all arrearages of interest thereon, shall, at the option of the holder of ——— part in value of the notes hereby secured, be and become due and payable immediately thereafter, although the period limited for the payment thereof may not then in fact have expired, anything hereinbefore or in said notes to the contrary thereof notwithstanding.

And it is further agreed and stipulated herein, that in case of the death or resignation of the said party of the second part, or of his inability to act as trustee aforesaid, then ——— of ——— may act with like powers in all respects as are hereby conferred on said party of the second part herein named; and in case of the death, resignation, or inability of said ——— to act, then the party or person who may at that time be the sheriff of the said county of ——— shall act as said trustee.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

Form 466.

Same. Statutory Form of Mortgage.

A. B. mortgages and warrants to C. D. (*describe premises to be mortgaged*), to secure the repayment of (*recite sum for which mortgage is granted, or notes or other evidence of debt, or a description thereof, to be secured, also the date of repayment*).

Form 467.

MINNESOTA: *Mortgage Containing Power of Sale.*

This indenture, made this ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ———,

party of the first part, and ——— party of the second part: Witnesseth, that the said party of the first part being justly indebted to said party of the second part in the sum of ——— dollars, for the purpose of securing the payment of said debt doth hereby grant, bargain, sell and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land lying and being in the county of ——— and state of Minnesota, described as follows: ———. To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns, forever. And the said ——— party of the first part, does covenant with the said party of the second part, his heirs and assigns, as follows: That he is lawfully seized of said premises; second, that he has good right to convey the same; third, that the same are free from all incumbrances, and fourth, that the said party of the second part, his heirs and assigns, shall quietly enjoy and possess the same, and that the said party of the first part will warrant and defend the title to the same against all lawful claims.

Provided, nevertheless, that if the said ———, party of the first part, his heirs, executors or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, his heirs, executors, administrators or assigns, the sum of ——— dollars, and interest, according to the conditions of — certain promissory note—, due ———, bearing even date herewith, then this deed to be null and void; otherwise to be and remain in full force and effect. But if the default shall be made in the payment of said sum of money, or interest, or any part thereof, at the time and in the manner hereinbefore specified for the payment thereof, the said party of the first part in such case does hereby authorize and fully empower the said party of the second part, his heirs, executors, administrators or assigns, to sell the said hereby granted premises at public auction, and convey the same to the purchasers in fee simple, agreeably to the statute in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall then be due on the said note—, together with all costs and charges, and also the sum of ——— dollars, as attorney's fees, and pay the overplus, if any, to the said party of the first part, his heirs, administrators or assigns.

And the said ———, party of the first part, does further covenant and agree, to and with the said party of the second part, his heirs, executors, administrators, and assigns, to pay said sum of money above specified, at the time and in the manner above mentioned, together with all costs and expenses, if any there shall be, and, also, in case of the foreclosure of this mortgage, the sum of

———dollars, as attorney's fees, in addition to all sums and costs allowed in that behalf by law, which said sum is hereby acknowledged and declared to be a part of the debt hereby secured, and which shall be assessed and payable as part of said debt, and that he will pay all taxes and assessments of every nature that may be assessed on said premises, or any part thereof, previous to the day appointed by law for the sale of lands for town, city, county or state taxes.

In testimony whereof, etc.

MISSISSIPPI: *Statutory Form of Deed of Trust or Mortgage.*

Form 468.

MISSISSIPPI. *Statutory Form of Deed of Trust or Mortgage.*

In consideration of (*state the consideration*), I convey and warrant to ——— the land described as (*describe property*). In trust, to secure (*here state what is secured*). Witness my signature the ——— day of ———, 19—.

Form 469.

MISSOURI: *Deed of Trust.*

This deed of trust made and entered into this ——— day of ———, one thousand nine hundred and ———, by and between ——— and ———, his wife, of the first part; and ———, of the second part; and ———, of the third part, witnesseth, that the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, and sell unto the said party of the second part, and to his heirs and assigns, forever, the following described tract of land, situate in the county of ——— and state of Missouri, to wit (*here describe it*), to have and to hold the same, with all rights, privileges, and appurtenances thereto belonging. In trust, however, for the following purposes: whereas the said ——— did, on the ——— day of ———, 19—, make and deliver to one ——— his promissory note in words and figures following (*copy note*): Now, if the said ———, his executors or administrators, shall pay the sum of money specified in said note, with all the interest that may be due thereon when said note shall become due and payable, according to the tenor and effect thereof (*or* within ——— days from the date of this deed), then this deed shall be void, and the

property hereinbefore conveyed shall be releasd at the expense of the said ———, otherwise the same shall remain in full force; and the said ———, or in case of his death, removal from the state, refusal, or other disqualification to act, the sheriff of the county, may proceed to sell the property hereinbefore described, or so much thereof as may be necessary to pay the amount specified in said note, with interest, and the costs of this trust, at public vendue, for cash, at ———, in the county of ———, first giving ——— days' notice of the time, terms, and place of sale, and of the property to be sold, by advertisement in some newspaper published in the county of ———, in the state of Missouri (*or in such other manner as the parties may agree to*), and upon the sale, and the payment of the purchase money, shall execute and deliver a deed of the property sold to the purchaser; and any statement of facts or recital by the said trustee, in relation to the nonpayment of the money secured to be paid, the advertisement, sale, receipt of money, and the execution of the deed to the purchaser, shall be received as *prima facie* evidence of such facts; and the said trustee shall, out of the proceeds of such sale, pay first the cost and expenses of this trust, and next, whatever may be in arrear and unpaid on the note aforesaid, and the balance (if any) shall be paid to the said ———, or his legal representatives. And the said ———, trustee as aforesaid, covenants to and with the said ——— and the said ———, severally, faithfully to perform and full the trust herein created. In witness whereof, etc.

Form 470.

Same. Mortgage with Power of Sale.

Know all men by these presents, that I, ———, of the county of ———, in the state of Missouri, have this day, for and in consideration of the sum of ——— dollars, to the said ——— in hand paid by ———, of the county of ———, in the state of ———, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said ———, the following described tracts or parcels of land, situate in the county of ———, in the state of Missouri: that is to say (*describe the land*). To have and to hold the premises hereby conveyed, with all the rights, privileges, and appurtenances thereto belonging or in any wise appertaining, unto the said ———, his heirs and assigns, forever, upon this express condition: whereas the said ———, on the ——— day of ———, 19— (*or,* has this day), made, executed, and delivered to the said ——— his certain promissory note, in words and figures following, to wit (*copy note*): Now, if the said ———, his executor or administrator, shall pay the sum of

money specified in said note, and all the interest that may be due thereon, according to the tenor and effect of said note, then this conveyance shall be void; otherwise it shall remain in full force and effect. And the said ———, or his executor or administrator, may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at ———, in the county of ———, for cash in hand, first giving ——— days' (not less than twenty) public notice of the time, terms, and place of sale, and the property to be sold, by advertisement (*in some newspaper printed or circulated in the county where the premises are situate, or any mode of advertisement agreed upon by the parties*), and upon such sale, and the payment of the purchase money, shall execute and deliver a conveyance of the property so sold to the purchaser thereof; and any statement of fact or recital by the said ——— in such conveyance in relation to the advertisement, sale, receipt of the purchase money, or execution of such conveyance, shall be received as *prima facie* evidence of the truth thereof. And the said ——— shall, with the proceeds of the sale aforesaid, pay first the expenses of this trust, and next, whatever may be in arrear and unpaid on said note, whether of principal or interest; and the balance (if any) shall be paid over to the said ———, or his legal representatives. In witness whereof, etc.

Form 471.

Same. Deed by Trustee Pursuant to Sale Under Power.

Whereas A. B., and C. D., the wife of the said A. B., on the ——— day of ———, 19—, executed and delivered to E. F. his deed to certain lands in the said deed specified, that is to say (*describe land as the same is described in deed of trust*), and in trust for the purposes therein mentioned; and whereas the sum of money mentioned in said deed, and the interest thereon, remained unpaid at and after the time specified in said deed for its payment; and whereas, also, the said E. F., in pursuance of the power and authority vested in him by the deed aforesaid, did advertise the property in said deed mentioned for sale, by publication in a newspaper called ———, published in the county of ———, in the state of Missouri (*or in the manner required by the trust deed*), at least ——— days before the day of sale, notifying all whom it might concern that the said property would be sold on the ——— day of ———, 19—, at ———, in the county of ———, for cash in hand; and whereas the said ———, on the day and year, at the place and on the terms last aforesaid, did offer the property aforesaid for sale at public vendue, and ———, being

the highest and best bidder therefor, became the purchaser thereof at and for the sum of ——— dollars, the receipt whereof is hereby acknowledged: Now, therefore, in consideration of the premises, I, the said ———, by these presents do grant, aliene, and convey unto the said ———, his heirs and assigns, all the right, title, and interest which I acquired in and to the above described lands, and the rights, privileges, and appurtenances thereto belonging, by virtue of the above recited deed: To have and to hold the premises thereby conveyed, together with all the rights, privileges, and appurtenances aforesaid, unto him, the said ———, his heirs and assigns, forever. In witness whereof, etc.

Form 472.

MONTANA: *Statutory Form of Mortgage.*

This mortgage, made the ——— day of ———, in the year ———, by ———, of ———, mortgagor, to ———, of ———, mortgagee, witnesseth, that the mortgagor mortgages to the mortgagee (*here describe the property*), as security for the payment to him of ——— dollars, on (*or* before) the ——— day of ———, in the year ———, with interest thereon (*or as security for the payment of an obligation, describing it, etc.*).

Form 473.

Same. Mortgage.

This mortgage made and entered into this ——— day of ——— A. D. 19— by and between ——— of ———, mortgagor, and ——— of ———, mortgagee.

Witnesseth: That the said mortgagor, for and in consideration of the sum of ——— dollars ($——) in hand, paid by said mortgagee, the receipt of which is hereby acknowledged, does hereby mortgage and confirm unto the said mortgagee and successors and assigns, forever the hereinafter described real estate, situate, lying and being in the city or town of ———, county of ———, and state of Montana.

Together with all and singular the tenements, hereditaments, appurtenances, easements, water and all other rights belonging or in anywise appertaining thereto, unto the said mortgagee and successors and assigns.

The said mortgagor represents to and covenants with the said mortgagee and successors and assigns that he will warrant and defend said premises against the lawful claims of all persons whomsoever, and the said mortgagor hereby relinquishes all right

of dower and all right of homestead, accruing or to accrue, in and to all of said premises; and the said mortgagor hereby covenants with the said mortgagee that he is lawfully "seized" and in possession of said premises and the same is free from all incumbrance excepting ———.

Provided always, that these presents are upon the express condition that if said mortgagor, his heirs, executors or administrators shall pay or cause to be paid to the said mortgagee and successors and assigns, the full sum of ——— dollars, according to the tenor and effect of that certain promissory note or obligation secured hereby a copy of said note or obligation being as follows:

Then these presents to be void, otherwise to be and remain in full force and effect.

It is agreed that if the mortgagor or maker or makers of the obligation secured by this indenture shall fail to pay the principal or any interest as the same become due; or any taxes or assessments or insurance as required, or otherwise fail to comply with any one or all of the conditions of this mortgage, then all of said debt secured hereby shall become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of the said mortgagee; and this mortgage may be foreclosed for the full amount, together with costs, taxes, insurance, cost of abstract of title, attorney's fees, and any and all other sums advanced or expense incurred on account of the said mortgagor, for whatsoever purposes, and any and all advances shall draw interest at the rate of ten per cent. per annum, and be liens under this indenture.

A release of this mortgage is to be made at the expense of the mortgagor, on full payment of the indebtedness secured hereby.

In witness whereof, etc.

Form 474.

NEBRASKA: *Mortgage.*

Know all men by these presents that I, ———, in consideration of ——— dollars in hand paid, do hereby grant, bargain, sell and convey unto ——— the following described real estate, situate in the county of ——— and state of Nebraska, to wit:

Together with all the appurtenances thereunto belonging; and I do hereby covenant with the said ———, his heirs and assigns, that I am lawfully seized of said premises, that they are free from incumbrance, and I do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Provided always, and these presents are upon this condition: That, whereas, said ——— executed and delivered to said ——— promissory note for the payment of ———.

Now, if the said ——— shall well and truly pay, or cause to be paid, the said sum of money in said note mentioned, with the interest thereon, according to the tenor and effect of said note, then these presents shall be null and void. But if said sum of money, or any part thereof, or any interest thereon, is not paid when the same is due, then and in that case the whole of said sum and interest shall, and by this indenture does, immediately become due and payable without notice; or if the taxes and assessments of every nature which are assessed or levied against said premises are not paid at the time when the same are by law made due and payable, then in like manner the whole of said sum shall immediately become due and payable, without notice, at the election of the mortgagee, his executors, administrators, or assigns, and in case of such default in payment of any instalment of principal or interest, or of taxes, I may forthwith proceed to foreclose this mortgage.

Signed this ——— day of ———, A. D. 19—.

Form 475.

NEVADA: *See California Form.*

Form 476.

NEW HAMPSHIRE: *Mortgage.*

Know all men by these presents that I, ——— of ———, in the county of ——— and state of ———, in consideration of ——— dollars to me paid by ——— of said ———, the receipt whereof I do hereby acknowledge, have given, granted, bargained, sold, and conveyed, and do for myself and my heirs, by these presents, give, grant, bargain, sell, and convey, unto the said ———, his heirs and assigns, forever, all that parcel, etc. To have and to hold the aforedescribed premises, with all the privileges and appurtenances thereunto belonging, to the said grantee, his heirs and assigns, to his and their use and behoof, forever. And I do covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the aforedescribed premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said grantee in manner aforesaid; and that I and my heirs will warrant and defend the same premises to the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons.

And I, ———, wife of said ———, in consideration aforesaid,

do hereby relinquish my right of dower in the before mentioned premises. And we, and each of us, hereby release our several rights of homestead in said premises, under and by virtue of any law of this state.

Provided, nevertheless, that if the said (*grantor*), his heirs, executors, or administrators, pay to the said (*grantee*), his heirs, executors, administrators, or assigns, the sum of ——— dollars in ——— years from this date, with interest thereon at the rate of ——— per cent. per annum, payable semi-annually, then this deed shall be void; otherwise to remain in full force.

In witness whereof, etc.

Form 477.

New Jersey. *Mortgage.*

This indenture, made the ——— day of ———, 19—, between ——— of ———, of the first part, and ——— of ———, of the second part: Whereas the said party of the first part, in and by his certain obligation or writing obligatory, under his hand and seal duly executed, and bearing even date herewith, stands bound unto the said party of the second part in the sum of ——— dollars, payable in ——— years from said date, together with interest thereon payable semi-annually, at the rate of ——— per cent. per annum, without any fraud or further delay, as in and by the said recited obligation and condition thereof, relation to the same being had, may more fully and at large appear:

Now this indenture witnesseth, that the said party of the first part, as well for and in consideration of the aforesaid debt or sum of ——— dollars, and for the better securing the payment thereof unto the said party of the second part, his executors, administrators, and assigns, in discharge of the said obligation above recited, as for and in consideration of the further sum of one dollar, in specie, well and truly paid to the said party of the first part by the said party of the second part at and before the ensealing and delivery hereof, the receipt of which one dollar is hereby acknowledged, hath granted, bargained, sold, released, and confirmed, and by these presents doth grant, bargain, sell, release, and confirm, unto the said party of the second part, his heirs and assigns, all that, etc.; together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments, and appurtenances to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the said hereditaments and premises above granted, or intended so to be, with the appurtenances, unto the said party of the second part, his

heirs and assigns, forever. Provided always, nevertheless, that if the said party of the first part, his heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid unto the said party of the second part, his executors, administrators, or assigns, the aforesaid debt or sum of ——— dollars on the day and at the time hereinbefore mentioned and appointed for the payment thereof, together with lawful interest for the same, in like money, in way and manner hereinbefore specified therefor, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made for or in respect of any taxes, charges, or assessments whatsoever; that then, and from thenceforth, as well this present indenture and the estate hereby granted as the said obligation above recited shall cease, determine, and become absolutely null and void, to all intents and purposes; anything hereinbefore contained to the contrary thereof in any wise notwithstanding. In witness, etc.

Form 478.

New York. *Statutory Form of Mortgage.*

This indenture, made the ——— day of ———, in the year nineteen hundred and ———, between ———, of ———, party of the first part, and ———, of ———, party of the second part: Whereas the said ——— is justly indebted to the said party of the second part in the sum of ——— dollars, lawful money of the United States, secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of ——— dollars, on the ——— day of ———, nineteen hundred and ———, and the interest thereon, to be computed from ——— at the rate of ——— per centum per annum, and to be paid.

It being thereby expressly agreed that the whole of the said principal sum shall become due after default in the payment of interest, taxes, or assessments, as hereinafter provided:

Now this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth hereby grant and release unto the said party of the second part, and to his heirs (*or successors*) and assigns forever (*description*), together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns, forever.

Provided always that if the said party of the first part, his heirs, executors, or administrators, shall pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, that then these presents, and the estate hereby granted, shall cease, determine, and be void.

And the said party of the first part covenants with the party of the second part as follows:

First. That the party of the first part will pay the indebtedness as hereinbefore provided; and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises therein described, according to law.

Second. That the party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee.

Third. And it is hereby expressly agreed that the whole of said principal sum shall become due at the option of the said party of the second part after default in the payment of any instalment of principal or of interest for ——— days, or after default in the payment of any tax or assessment for ——— days after notice and demand.

In witness whereof, etc.

Form 479.

Same. Mortgage Containing Power of Sale and Special Claims.

This indenture, made this ——— day of ———, 19—, between ——— of ———, in the state of ———, of the first part and ——— of ———, in the state of ———, of the second part, witnesseth, that the said party of the first part, in consideration of the sum of ——— dollars, to him duly paid, has granted, bargained, sold, and conveyed, and by these presents doth grant and convey, to the said party of the second part, his heirs and assigns, all that parcel, etc.

This grant is intended as a security for the payment of the sum of ——— dollars, in ——— years from the date of these presents, with interest thereon at the rate of ——— per cent. per annum, according to the condition of a bond this day executed and delivered by the said ——— party of the first part, to the said party of the second part; and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to

be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators, or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all the moneys arising from such sale to retain the amount then due for principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

And the said ———, party of the first part, further covenants for himself, his executors, administrators, and assigns, that he will, during all the time until all the said moneys secured by these presents shall be fully paid and satisfied, pay and discharge, immediately after they shall be or become due and payable, all taxes, water rates, assessments, or charges which may be levied, laid, or assessed upon the above described premises, or any part thereof, and in case the said party of the first part, his executors, administrators, or assigns, shall fail or neglect to pay all such taxes, assessments, water rates, or charges, or either of them, on said premises, or any part thereof, within ——— days after the same shall be or become due or payable, then the said party of the second part, his executors, administrators, or assigns, may pay the same, and the sum so paid, with interest thereon from the time of such payment, the said ———, party of the first part, for himself, his executors, administrators, and assigns, covenants to pay to the said party of the second part, his executors, administrators, or assigns, on demand, and that the same shall be and be deemed to be secured by these presents, and shall be collectible thereon and thereby in like manner as the said moneys mentioned in the said bond or obligation.

And it is hereby expressly agreed, that should any default be made in the payment of the said principal or interest, or of any part thereof, on any day whereon the same is made payable as above expressed, and should the same remain unpaid and in arrears for the space of ——— days, then and from thenceforth, that is to say, after the lapse of the said ——— days, the aforesaid principal sum of ——— dollars, with all arrearage of interest thereon, shall, at the option of said party of the second part, his executors, administrators, or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in any wise notwithstanding; with the like rights, in the party of the second part, and his executors, administrators, and assigns, at his option to elect that the whole principal, interest, and all sums secured

hereby, shall become due after failure, for a like time, to insure or pay taxes, assessments, and water rates, or any part thereof.

And it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire, by insurers and in an amount approved by the said party of the second part, not exceeding ——— dollars, and assign the policy and certificate thereof to the said party of the second part; and in default thereof it shall be lawful for the said party of the second part to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and payable on demand, with legal interest.

In witness whereof, etc.

Form 480.

NORTH CAROLINA: *Statutory Form of Mortgage.*

North Carolina, ——— County:

I, ———, am indebted to ——— in the sum of ———, as evidenced by my note dated ———, due ———, with interest from ——— at the rate of ——— per cent. and to secure its payment do mortgage to him (or convey in trust to ———) the following tract of land (here describe land).

Form 481.

NORTH DAKOTA: *Statutory Form of Mortgage.*

This mortgage, made the ——— day of ———, in the year ———, by A. B., of ———, mortgagor, to C. D., of ———, mortgagee, witnesseth, That the mortgagor mortgages to the mortgagee (*describe the property to be mortgaged*), as security for the payment to him of ——— dollars on or before the ——— day of ———, in the year ———, with interest thereon (*or* as security for the payment of an obligation, *describing it, etc.*)

Form 482.

OHIO: *Mortgage Releasing of Dower.*

Know all men by these presents, that I, ———, of ———, in the county of ———, and state of ———, in consideration of ——— dollars to me paid by ——— of said ———, the receipt

whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said ———, his heirs and assigns, forever, all that, etc., and all the estate, title, and interest of the said grantor, either in law or in equity, of, in, and to the said premises; together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof: To have and to hold the same to the only proper use of the said grantee, his heirs and assigns, forever. And the said ———, for himself, and for his heirs, executors, and administrators, doth hereby covenant with the said grantee, his heirs and assigns, that he is the true and lawful owner of the said premises, and has full power to convey the same; that the title so conveyed is clear, free, and unincumbered; and further, that he doth warrant and will defend the same against all claim or claims of all persons whomsoever. Provided, nevertheless, that if the said (*mortgagor*) shall pay to the said (*mortgagee*) the sum of ——— dollars in ——— years from the date of these presents, with interest thereon at the rate of ——— per cent. per annum, payable semi-annually, as evidence by the promissory note of the said mortgagor of even date herewith, then these presents shall be void.

In witness whereof the said ———, and ———, his wife, who hereby releases her right and expectancy of dower in said premises, have hereunto set their hands and seals this ——— day of ———, 19—. In witness, etc.

Form 483.

OKLAHOMA: *Statutory Form of Mortgage.*

This mortgage made ——— day of ——— in the year ——— by A. B., of ——— mortgagor to C. D., of ———, mortgagee witnesseth: That the mortgagor mortgages to the mortgagee (here describe the property) as security for the payment to him of ——— dollars, on or before the ——— day of ——— in the year ———, with interest thereon (or as security for the payment of an obligation, describing it).

Form 484.

PENNSYLVANIA: *Scire Facias Mortgage.*

This indenture, made the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, between ——— of ———, of the first part, and ——— of ———, of the second part.

Whereas, the said party of the first part, in and by his obliga-

tion or writing obligatory under his hand and seal duly executed, bearing even date herewith, stands bound unto the said party of the second part in the sum of ——— dollars lawful money of the United States of America, conditioned for the payment of the just sum of ——— dollars in ——— years from the date thereof, with interest thereon at the rate of ——— per cent. per annum, payable semi-annually, without any fraud or further delay; provided, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of any instalment of interest on said sum for the space of ——— days after such interest shall fall due, then and in such case the whole principal debt aforesaid shall, at the option of the said ———, his executors, administrators or assigns, become due and payable immediately; and payment of said principal, and all interest thereon, may be enforced and recovered at once, anything therein contained to the contrary thereof notwithstanding, as in and by the said recited obligation and the condition thereof, relation being thereunto had, may more fully and at large appear:

Now this indenture witnesseth, that the said party of the first part, as well for and in consideration of the aforesaid debt or sum of ——— dollars, and for the better securing the payment of the same, with interest, unto the said party of the second part, his executors, administrators, and assigns, in discharge of the said recited obligation, as, for, and in consideration of the further sum of one dollar unto him in hand well and truly paid by the said party of the second part at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, sell, aliene, enfeoff, release, and confirm, unto the said ———, party of the second part, his heirs and assigns, all that parcel of land, etc., together with all and singular the ways, waters, water-courses, rights, liberties, privileges, improvements, hereditaments, and appurtenances whatsoever, thereunto belonging or in any wise appertaining, and the reversions and remainders, rents, issues, and profits thereof: To have and to hold the said hereditaments and premises hereby granted, or mentioned and intended so to be, with the appurtenances, unto the said ———, party of the second part, his heirs and assigns, to and for the only proper use and behoof of the said ———, his heirs and assigns, forever.

Provided always, nevertheless, that if the said ———, party of the first part, his heirs, executors, administrators, or assigns, do and shall well and truly pay, or cause to be paid, unto the said ———, party of the second part, his executors, administrators, or assigns, the aforesaid debt or sum of ——— dollars, on the day and time hereinbefore mentioned and appointed for payment of

the same, together with interest as aforesaid, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of anything, for or in respect of any taxes, charges, or assessments whatsoever, that then, and from thenceforth, as well this present indenture, and the estate hereby granted, as the said recited obligation, shall cease, determine, and become void, anything hereinbefore contained to the contrary thereof in any wise notwithstanding. Provided further, in case of default in the payment of the said principal debt or sum hereby secured, or in case of default as aforesaid, for the space of ——— days, in the payment of the interest on said debt or sum, that thereupon it shall be lawful for the said ———, party of the second part, his executors, administrators, or assigns, to sue out forthwith a writ of *scire facias* upon this present indenture or mortgage, and to proceed at once thereon to recover the principal moneys hereby secured, and all interest thereon, according to law, without further stay, any law or usage to the contrary notwithstanding.

In witness whereof, etc.

Form 485.

RHODE ISLAND: *Mortgage and Power of Sale.*

To all people to whom these presents shall come: I, ———, of ———, in the county of ——— and state of ———, send greeting: Know ye that I, the said ——— (hereinafter called the grantor), for and in consideration of the sum of ——— dollars in hand, before the ensealing hereof well and truly paid by ———, of said ———, the receipt whereof I do hereby acknowledge, and am therewith fully satisfied, contented, and paid; and thereof, and of every part and parcel thereof, do exonerate, acquit, and discharge the said ———, his heirs, executors, and administrators, forever, by these presents: have given, granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents do freely, fully, and absolutely give, grant, bargain, sell, aliene, enfeoff, convey, and confirm unto the said ——— (hereinafter called the grantee), his heirs and assigns, forever, all that parcel, etc.

To have and to hold the said granted and bargained premises, with all the appurtenances, privileges, and commodities to the same belonging or in any wise appertaining, to the said grantee, his heirs and assigns, forever, to his and their own proper use, benefit, and behoof, forever. And I, the said grantor, for myself, my heirs, executors, and administrators, do covenant, promise, and grant to and with the said grantee, his heirs and assigns, that

at and before the ensealing hereof I am the true, sole, and lawful owner of the above bargained premises, and am lawfully seized and possessed of the same in my own proper right, as good, perfect, and absolute estate of inheritance in fee simple; and have in me good right, full power, and lawful authority to grant, bargain, sell, convey, and confirm the said bargained premises, in manner as aforesaid. And that the said grantee, his heirs and assigns, shall and may from time to time, and at all times forever hereafter, by force and virtue of these presents, lawfully, peaceably, and quietly have, hold, use, occupy, possess and enjoy the said demised and bargained premises, with the appurtenances, free and clear, and freely acquitted, exonerated, and discharged of and from all and all manner of former or other gifts, grants, bargains, sales, leases, mortgages, wills, entails, jointures, dowries, judgments, executions, and incumbrances, of what name or nature soever, that might in any measure or degree obstruct or make void this present deed.

Furthermore, I, the said grantor, for myself, my heirs, executors, and administrators, do covenant and engage the above demised premises to the said grantee, his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever, to warrant, secure, and defend by these presents.

And I, ———, wife of the said grantor, in consideration of the sum paid as aforesaid, do hereby release and forever quitclaim unto the said grantee, his heirs and assigns, all my right of dower in and to the aforegranted premises.

The condition of this deed is such, that whereas I, the said grantor, have executed my negotiable promissory note for the sum of ——— dollars, bearing even date herewith and made payable to the order of said ——— in ——— years from this date, with interest at the rate of ——— per centum per annum, payable semi-annually till said principal sum is paid, whether at or after maturity, and all instalments of interest in arrear, whether before or after maturity, to bear interest at the rate aforesaid till paid: Now, therefore, if I, the said grantor, or my heirs, executors, administrators, or assigns, or any other person, for me or for them, shall pay said note at maturity, together with the interest thereon, according to the tenor thereof, then this deed shall be void, otherwise shall be and remain in full force and effect.

Furthermore, I, the said grantor, do hereby constitute and appoint the said grantee, his executors, administrators, and assigns, my attorneys irrevocable, with full powers of substitution and revocation for me and in my name, or in his or their name or names, at any time, in case default shall be made in the

payment of said note, or of the semi-annual interest due thereon, or breach shall be made of the covenants of insurance hereinafter contained, and such default or breach shall continue for the term of ten days, to sell at public auction the premises aforesaid, or any part thereof, they first giving, after the expiration of said term of ten days, twenty days' notice of such sale, in some one of the public newspapers printed in said ———, and in my name, or in their name or names, to make, execute, seal, acknowledge, and deliver to the purchaser or purchasers thereof any deed or deeds that may be necessary to vest in such purchaser or purchasers a full and absolute estate in fee simple therein, and on sale thereof (hereby granting unto my said attorneys power to continue or adjourn such sale from time to time) do authorize my said attorneys to receive the amount the same may be sold for, and after the payment of all the expenses incident to such sale or sales to apply and appropriate the residue thereof to the payment of the amount of principal and interest of said note hereby secured (I hereby agreeing that in case of a sale for default in the payment of semi-annual interest, or for breach of such covenants of insurance, the principal of said note shall be deemed due and payable on the day of such sale), accounting to me, or my heirs and assigns, for all sums over and above the amount thereof; I hereby ratifying, approving, and confirming such sale or sales as may be made or caused to be made by virtue hereof.

Furthermore, I, the said grantor, for myself and for my heirs, executors, administrators, and assigns, do hereby covenant with the said grantee, his heirs or assigns, that insurance against loss by fire shall be kept and maintained upon the buildings on the premises aforesaid in a sum not less than ——— dollars, and that the policy or policies of such insurance shall be assigned and transferred to the said grantee and assigns, as collateral security hereto, and in default thereof do hereby agree that the said grantee or assigns may effect such insurance, and the premium or premiums paid thereon shall be a further lien upon the said estate added to the amount of said note and secured by these presents. In testimony, etc.

Form 486.

SOUTH DAKOTA: *Mortgage—With Power of Sale.*

This mortgage, made this ——— day of ——— in the year 19—, by ——— of ———, county and state of ——— mortgagor— to ——— of ———, county and state of ——— mortgagee— whose postoffice address is ———.

Witnesseth, that said mortgagor— hereby mortgage— to said

mortgagee— the following described premises situated in the county of ——— and state of South Dakota, to wit: ——— as security for the payment to said mortgagee— at ——— of the principal sum of ——— dollars and interest thereon at ——— per cent. per annum from date ——— payable ——— annually on ——— according to the tenor and effect of ——— promissory note—, bearing date even herewith ——— made by said ——— mortgagor— to said mortgagee—, described as follows, to wit: one for ——— dollars, due ———, 19—, one for ——— dollars, due ———, 19—.

Said mortgagor— further agree— to pay all taxes and assessments that may be levied upon said premises, before the same shall become delinquent (and to keep the buildings, if any, upon said premises, safely insured for the benefit of said mortgagee— for ——— dollars against loss by fire ——— and deliver the insurance policies to said mortgagee—). In case of the mortgagor's failure to pay said taxes or assessments before becoming delinquent or to pay insurance premiums for insurance on said buildings, said mortgagee— or assignee may do so and the amounts so paid, with interest at 12 ——— per cent. from date of payment, shall be added to and deemed a part of the money secured by this mortgage. Said mortgagor— hereby relinquish ——— rights of homestead in said premises and warrant that —he ——— the owner— in fee of said premises, and that the same are free from all incumbrances.

In case default shall be made in the payment of said principal sum of money or any part thereof or interest thereon at the time or times above specified for payment thereof, or in case of nonpayment of any taxes, assessments, or insurance as aforesaid, or of the breach of any covenant or agreement herein contained, then and in either case, the whole, principal and interest, of said note— shall at the option of the holder thereof, immediately become due and payable, and this mortgage may be foreclosed by action, or by advertisement as provided by Chapter 28 of the Code of Civil Procedure of the Revised Codes (1903), State of South Dakota, and this paragraph shall be deemed as authorizing and constituting a power of sale as provided in said chapter.

Signed and delivered in presence of ———.

Form 487.

Same. Statutory Form of Mortgage.

This mortgage, made the ——— day of ———, in the year ———, by A. B., of ———, mortgagor, to C. D., of ———, mortgagee, witnesseth:

That the mortgagor mortgages to the mortgagee (*here describe*

the property), as security for the payment to him of ——— dollars, on (or before) the ——— day of ———, in the year ———, with interest thereon (or as security for the payment of obligation, describing it, etc.).

Form 488.

TENNESSEE: *Statutory Form of Mortgage.*

I hereby convey to ——— the following land (*describing it*) to be void upon condition that I pay, etc.

Form 489.

Same. Statutory Deed of Trust.

For the purpose of securing to ——— a note of this date, due at twelve months, with interest from date (*or as the case may be*), I hereby convey to ———, in trust, the following property (*describing it*). And if the note is not paid at maturity, I hereby authorize ——— to sell the property herein conveyed (*stating the manner, place of sale, notice, etc.*), to execute a deed to the purchaser, to pay off the amount herein secured, with interest and costs, and to hold the remainder subject to my order.

Form 490.

Same. Statutory Form of Satisfaction.

I (or we) declare that I am (or we are) the true and lawful holder (or holders) of the claim (or part of the claim, and specifying what part) secured by the instrument within recorded, and hereby acknowledged the satisfaction thereof and discharge of the lien to secure the same in full (or if one part, state what part). This ——— day of ———.

Form 491.

UTAH: *Statutory Form of Mortgage.*

A. B., mortgagor (*here insert name or names and place of residence*), hereby mortgages to C. D., mortgagee (*here insert name or names and place of residence*), for the sum of ——— dollars, the following tract— of land in ——— county, Utah (*here describe the premises*).

This mortgage is given to secure the following indebtedness

(here state amounts and form of indebtedness, maturity, rate of interest, by and to whom payable, and where).

The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of ——— dollars attorney's fee in case of foreclosure.

Witness the hand of said mortgagor this ——— day of ———, A. D. ———.

Form 492.

VERMONT: *Mortgage Deed.*

Know all men by these presents, that I, ———, of ———, in the county of ——— and state of Vermont, for the consideration of ——— dollars, received to my full satisfaction of ——— of ———, in the county of ——— and state of ———, do give, grant, bargain, sell, and confirm unto the said ———, his heirs and assigns, a certain piece of land in ———, in the county of ——— and state of Vermont, described as follows, etc.: To have and to hold the above granted and bargained premises, with the appurtenances thereto, unto him the said ———, his heirs and assigns, forever, to them and their own proper use, benefit, and behoof. And alo I, the said grantor, do for myself my heirs, executors, and administrators, covenant with the said ———, his heirs and assigns, that at and until the ensealing of these presents I am well seized of the premises, as a good indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written, and that the same are free from all incumbrances whatsoever; and furthermore, I, the said grantor, do by these presents bind myself and heirs forever to warrant and defend the same against all lawful claims and demands whatsoever.

The conditions of this deed are such that if I, the said grantor, shall pay unto the said grantee, his executors, administrators, or assigns, the sum of ——— dollars in ——— years from the date hereof, with interest thereon at the rate of ——— per cent. per annum, payable semi-annually, then this deed to be null and void, otherwise to remain in full force and virtue. In witness, etc.

Form 493.

Same. Statutory Form of Discharge.

I hereby certify that the following described mortgage is paid in full and satisfied, viz.: ———, mortgagor, to ———, mortgagee, dated ———, A. D. 19—, and recorded in book ———, page ———, of the land records of the town of ———.

Form 494.

VIRGINIA: *Trust Deed.*

This deed, made this ——— day of ———, 19—, between ——— of ———, county of ——— and state of ———, of the one part, and ——— of ———, and ——— of ———, of the other part, witnesseth, that the said party of the first part doth grant unto the said parties of the second part the following property, to wit, etc.

In trust, to secure to ——— of ———, in the state of ———, the payment of the sum of ——— dollars in ——— years from this date, with ——— per cent. per annum thereon, according to a promissory note made by the said party of the first part to said ——— for said sum.

In the event that default shall be made in the payment of the above mentioned sum as it becomes due and payable, then the trustee, or either of them, on being required so to do by said ———, his executors, administrators, or assigns, shall sell the property hereby conveyed. And it is covenanted and agreed between the parties aforesaid that in case of a sale the same shall be made after first advertising the time, place, anrd terms thereof, for ——— days in some newspaper published in the said county of ———, and upon the following terms, to wit: for cash as to so much of the proceeds as may be necessary to defray the expenses of executing this trust, the fees for drawing and recording this deed, if then unpaid, and to discharge the amount of money then payable upon the said note; and if there be any residue of said purchase money, the same shall be made payable at such time, and be secured in such manner, as the said ———, his executors, administrators, or assigns, shall prescribe and direct, or in case of his or their failure to give such direction at such time and in such manner as the said trustees, or either of them, shall think fit. The said party of the first part covenants to pay all taxes, assessments, dues, and charges upon the said property hereby conveyed so long as he or his heirs or assigns shall hold the same, and hereby waives the benefit of all homestead exemption as to the debt secured by this deed.

If no default shall be made in the payment of the above mentioned debt, then, upon the request of the party of the first part, a good and sufficient deed of release shall be executed to him at his own proper costs and charges. Witness the following signature and seal.

Form 495.

VIRGINIA AND WEST VIRGINIA: *Statutory Form of Deed of Trust.*

This deed, made the ——— day of ———, in the year ———, between ——— (*the grantor*), of the one part, and ——— (*the trustee*), of the other part, witnesseth, that the said ——— (*the grantor*) doth (*or do*) grant unto the said ——— (*the trustee*) the following property (*here describe it*). In trust, to secure (*here describe the debts to be secured, or the sureties to be indemnified, and insert covenants, or any other provisions the parties may agree upon*). Witness the following signatures and seals.

Form 496.

WASHINGTON: *Mortgage.*

Know all men by these presents, that ——— of ———, party of the first part, in consideration of ——— dollars paid by ——— of ———, party of the second part, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, convey and mortgage unto the said ——— the following described real estate, situate in the county of ——— and state of Washington, to wit: To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging unto the said ———, and his heirs and assigns, to their own use and behoof forever.

And he hereby covenants to defend the title to the granted premises against the lawful claims of all persons. Provided nevertheless, and these presents are upon the express condition, that if ——— or his assigns, executors, administrators or assigns, shall pay unto the grantee, or his heirs, executors, administrators or assigns, the sum of ——— dollars, according to the tenor and terms of ——— certain promissory notes made by the grantor, for ——— dollars, dated ———, Washington, 19—, and payable at ——— on ———, with interest at ——— per ——— annum, and shall perform and observe all covenants and conditions hereinafter contained, then this mortgage and the notes hereby secured shall be void, otherwise to remain in full force and effect.

It is agreed that time shall be material, and the essence of this mortgage, and if default be made in the payment of the notes hereby secured and the interest thereon or any part thereof when due, then said notes, except interest thereon for unexpired time, shall, at the option of the owner thereof, become at once due and payable without further notice, and suit in foreclosure of this

mortgage may be commenced at once; and in the judgment and decree of such foreclosure, a reasonable attorney's fee shall be included in the judgment and in case such foreclosure suit is settled before judgment is recorded therein, such attorney's fee shall nevertheless be paid; and if the debt and interest or any instalment thereof secured by this mortgage are not paid when due, such sums so overdue shall bear interest at the rate of ——— per cent. per ——— from maturity until paid.

In witness whereof, etc.

Form 497.

WEST VIRGINIA: *Deed by Trustee Upon Sale.*

This deed, made the ——— day of ———, between ———, trustee, of the first part, and ———, of the second part, witnesseth, whereas the said trustee, by virtue of the authority vested in him by the deed of trust hereinafter mentioned (*or* by an order of the circuit court of the county of ———, made on the ——— day of ——— (*as the case may be*), did sell, as required by law, a certain tract (*or* lot, *as the case may be*) of land, situate in the county (*or* city, town or village, *as the case may be*) of ———, conveyed by ——— (*the grantor*) to the said ———, trustee, by deed bearing date the ——— day of ———, and recorded in deed book ———, on page ———, in the office of the clerk of the county court of the county of ———, and bounded and described therein as follows (*here insert the description and quantity as set forth in the deed of trust and any further description deemed necessary*). And whereas at which sale the said ——— purchased the said property for the sum of ——— dollars. Now, therefore, this deed witnesseth, that the said ———, trustee as aforesaid, doth grant unto the said ——— the said real estate hereinbefore described. Witness the following signature and seal.

Form 498.

Same. Form of Release of Mortgage or Deed of Trust.

I, A. B., hereby release a mortgage (*or deed of trust*) made by C. D. to me (*or to E. F., my trustee, or to ——— and assigned to me*), dated the ——— day of ———, recorded in the office of the clerk of the county court of ———, county, West Virginia, in deed book ———, page ———.

(*To be signed*) *A. B.*

Form 499.

WISCONSIN: *Statutory Form of Mortgage.*

A. B., mortgagor, of ——— county, Wisconsin, hereby mortgages to C. D., mortgagee, of ——— county, Wisconsin, for the sum of ——— dollars, the following tract of land in ——— county (*describe the premises*).

This mortgage is given to secure the following indebtedness (*state amount or amounts, and form of indebtedness, whether on note, bond, or otherwise, time or times when due, rate of interest, by and to whom payable, etc.*).

The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of ——— dollars, attorney's fee, in case of foreclosure thereof. Witness the hand and seal of said mortgagor this ——— day of ———, 19—.

Form 500.

WYOMING: *Statutory Form of Mortgage Deed.*

A. B., mortgagor (*here insert name or names and place of residence of mortgagor*), to secure the payment of (*here insert the amount of indebtedness, when due, rate of interest, and whether secured by a note or otherwise*), do hereby mortgage to C. D., mortgagee (*here insert name and residence of the mortgagee*), the following described real estate (*here insert description thereof*), situate in ——— county, state of Wyoming. The mortgagor agrees to pay all taxes and assessments on said premises, to keep the buildings thereon insured in a sum not less than $——— during the life of this mortgage, payable to the mortgagee, and, in case he shall fail to pay said taxes and assessments and to keep said premises insured as aforesaid, the mortgagee may insure said building or buildings and pay said taxes, and all amounts so paid shall be added to and considered as part of the above indebtedness hereby secured and shall draw interest at the same rate. In case of default of payment of either interest or principal, then the whole indebtedness herein secured shall become due and payable, and the mortgagee may proceed, pursuant to law, to foreclose on said property; and in case of foreclosure, the mortgagor hereby agrees to pay all costs of the same, including an attorney's fee of $———.

(*If the right of homestead is released add the following*): Hereby relinquishing and waiving all rights under and by virtue of the homestead exemption laws of this state.

Dated this ——— day of ———, 19—, in presence of ———.

Form 501.

Same. Statutory Certificate of Discharge.

This certifies that a (*mortgage, or deed of trust, as the case may be*) from ——— to ———, dated ———, A. D. 19—, and recorded in book ——— of ———, on page ———, has been fully satisfied by the payment of the debt secured thereby, and is hereby canceled and discharged. ———. Signed in the presence of ———, county clerk of ——— county.

Filed and recorded ———, A. D. 19—, at ———, ——— M.

———, County Clerk.

Form 502.

Same. Statutory Form of Deed of Trust.

This deed, made the ——— day of ———, 19—, between ——— (*the grantor*), of the one part, and ——— (*the trustee*), of the other part, witnesseth, that the said ——— (*the grantor*) doth (*or* do) grant unto the said ——— (*the trustee*) the following property (*here describe it*), in trust, to secure (*here describe the debts to be secured or the sureties to be indemnified, and insert covenants or any other provisions the parties may agree upon*). Witness the following signatures and seals.

Form 503.

Same. Statutory Form of Deed upon Sale under a Deed of Trust.

This deed, made the ——— day of ———, between A. B., trustee, of the first part, and C. D., of the second part: whereas, the said trustee, by virtue of the authority vested in him by the deed of trust hereinafter mentioned (*or* by an order of the district court of the county of ———, made on the ——— day of ——— (*as the case may be*), did sell as required by law a certain tract (*or lot, as the case may be*) of land, situated in the county (*or*

city, town or village, *as the case may be*) of ——— ,conveyed by E. F. to the said A. B., trustee, by deed bearing date the ——— day of ———, and recorded (*if it be recorded*) in deed book ———, on page ———, in the office of the recorder in the county of ———, and bounded and described therein as follows (*here insert the description and quantity as set forth in the deed of trust and any further description deemed necessary*); at which sale the said C. D. became the purchaser, for the sum of ——— dollars: Now, therefore, this deed witnesseth, that the said trustee hereby conveys and grants to the said C. D. the said real estate hereinbefore described, with all the right, title, and interest held by the said E. F. therein: To have and to hold the said real estate and premises unto the said C. D., his heirs and assigns, forever. Witness the following signature and seal.

CHAPTER VI.

Powers of Attorney.

F. 504. General power of attorney.
505. Special power of attorney.
506. Granting additional powers to an attorney.
507. Clause for general powers.
507a. Power of attorney to sell land.
508. Power of attorney to execute and deliver a certain deed.
509. Power of attorney to mortgage a particular piece of land.
510. Power of attorney to mortgage property generally.
511. Power of attorney to borrow money and execute a mortgage.
512. Power of attorney to satisfy mortgage.
513. Power of attorney for the management of real property.
F. 514. Power of attorney given by one going abroad for the management of his real estate and other interests.
515. Power to appoint a substitute.
516. Substitute to be appointed if attorney becomes incapable.
517. Substitution of attorney. Another form.
518. Appointment of substitutes by authority in a power of attorney.
519. Provision validating acts of attorney after principal's death.
520. Revocation of power of attorney.
521. Revocation of power of attorney and appointment of new attorney.

Form 504.

General Power of Attorney.

Know all men by these presents: That I, A. B., county of ———, ——— of ——— have made, constituted, and appointed, and by these presents do— make, constitute and appoint C. D. my true and lawful attorney— for me and in my name, place, and stead, and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, pay-

able or belonging to me; and have, use, and take all lawful ways and means in my name or otherwise for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and give acquittances or other sufficient discharges for the same, for me and in my name, to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizin and possession of all lands, and all deeds and other assurances, in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments upon such terms and conditions, and under such covenants, as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make, do, and transact all and every kind of business of what nature or kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignment of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and Granting unto my said attorney— full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, ——— hereby ratifying all that my said attorney, or his substitutes shall lawfully do or cause to be done by virtue of these presents.

In witness where, I have hereunto set my hand and seal the ——— day of ——— nineteen hundred and ———.

Form 505.

Special Power of Attorney.

Know all men by these presents: That I, A. B. have made, constituted and appointed, and by these presents do— hereby make, constitute and appoint C. D my true and lawful attorney— for me and in my name, place, and stead, ———

Giving and granting unto my said attorney— full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the prem-

ises, as fully to all intents and purposes as I might or could do if personally present ——— hereby ratifying and confirming all that my said attorney ——— shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand and seal the ——— day of ——— one thousand eight hundred and ninety ———.

Form 506.

Granting Additional Powers to an Attorney.

Know all men by these presents, that whereas by a certain power power of attorney, dated, etc., under my hand and seal, I appointed C. D. of ——— to be my attorney with the powers therein mentioned, and whereas I now desire to give to the said C. D. the further or additional powers hereinafter set out: Now these presents witness that I do hereby give and vest in the said C. D. the following further or additional powers, that is to say, in my name and on my behalf, etc. Provided always that nothing herein contained shall in any wise prejudice or affect the powers or authorities given or conferred by the power of attorney hereinbefore mentioned and this present power of attorney shall take effect and be in force concurrently with, and solely by way of enlargement and extension of the said mentioned power of attorney. In witness, etc.

Form 507.

Clause for General Powers.

Know all men by these presents, that I do hereby constitute and appoint, etc., ——— my true and lawful attorney, etc.

And generally to act as my attorney or agent at ——— aforesaid, in relation to the premises, and all other matters in which I may be interested or concerned, and on my behalf to make, and execute all such instruments, and to do and perform all such acts and things, as fully and effectually in all respects as I myself could do if personally present.

Ratification of Acts Performed by Attorney.

And I hereby for myself, my heirs, executors, and administrators, ratify and confirm, and do hereby agree to ratify and confirm, whatsoever my said attorney shall do under and by authority of these presents.

Power of Attorney to Sell Land.

Know all men by these presents, that I, A. B., hereby irrevocably appoint C. D. of ——— to be my lawful attorney during my absence from the state (or for the term of ——— years from the date of these presents), for me and in my name place and stead and for my use to sell and convey my land and appurtenances or any parcel thereof, situate in the county of ———, state of ———, either by private contract or

Form 508.

Power of Attorney to Execute and Deliver a Certain Deed.

Know all men by these presents, that I, A. B., do hereby make, constitute and appoint, etc., ——— in my name, place and stead, and as my act and deed, to sign, seal, acknowledge, and deliver a certain deed, prepared for execution, and bearing date on or about the ———.day of ———, by which it is intended to convey to A. B. of ——— a certain lot of land, situate, etc., for the consideration of ——— dollars, and for me to receive said purchase money and to give a proper receipt therefor.

Form 509.

Power of Attorney to Mortgage a Particular Piece of Land.

Know all men by these presents, etc. For me, and in my name, and as my act and deed, to sign, seal, acknowledge, and deliver a note and mortgage of a certain lot of land connected therewith, in the city of ———, etc., to such person or persons, savings bank, or other corporation, as shall loan to me thereon the sum of ten thousand dollars, and for me to receive the amount of said loan.

Form 510.

To Mortgage Property Generally.

Know all men by these presents, etc., to borrow from time to time such sums of money and upon such terms as the said attorney may think advisable or expedient for or in relation to any of the purposes or objects aforesaid, upon the security of any of my property, whether real or personal, or otherwise, and for such purposes to give and execute and deliver and acknowledge mortgages with such powers and provisions as he may think proper,

as also such notes or bonds as it is usual necessary or proper to use therewith.

Form 511.

Power of Attorney to Borrow Money and Execute Mortgage.

Know all men by these presents that I, A. B., of ———, in the county of ———, state of ———, do hereby make, constitute and appoint C. D., of ———, my true and lawful attorney, for me and in my name, place and stead, to borrow upon the security of my property in ———, described as follows: (here insert description) a sum or sums not exceeding ——— dollars, and to sign, seal, and deliver a note for the payment thereof, and to sign, seal, and deliver, for the purpose of securing the payment of the same, a mortgage upon said real estate, with the usual power of sale, and interest and insurance clauses, and other usual provisions and covenants.

In witness whereof, etc.

Form 512.

Power of Attorney to Satisfy Mortgage.

Know all men by these presents that I, A. B. of ———, have made, constituted, and appointed, and by these presents do make, constitute, and appoint C. D. of ——— my true and lawful attorney, for me and in my name, place and stead, to receive the principal and interest due on a certain note secured by a mortgage given by ——— of ——— to me, dated the ——— day of ———, A. D. 19—, and recorded in the office for recording deeds in and for the county of ———, in mortgage book ———, page ———, to secure the payment of the sum of ——— dollars, with interest, as therein provided, upon all that certain tract or parcel of land situate, etc.; and on receipt of said principal, interest, and costs, to release the said mortgage by deed, or to appear for me and in my name in the aforesaid office, and there to acknowledge and enter satisfaction on the margin of the record of said mortgage; and also for me and in my name to make the necessary transfer of any policy or policies of insurance upon the mortgaged premises which may then stand in my name; giving and granting unto my said attorney full power and authority to do and perform all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that the said attorney, or substitute or substitutes, shall do therein by virtue of these presents. In witness, etc.

Form 513.

Power of Attorney for the Management of Real Property.

Know all men by these presents, etc.

To manage or superintend all the estates of which I am or shall become possessed in the town of ———, and state of ———, and to cut timber and mine coal upon said estate, and to erect, demolish, and repair houres or other buildings, or machinery, and to make roads on or otherwise improve any of the premises, and to insure the buildings and other property against damage or loss by fire, as in the judgment of my said attorney may seem necessary or proper by public auction, on his discretion and either together or in separate parcels or lots, for such price as to him shall seem advisable.

I do hereby authorize my said attorney, upon the receipt of the consideration or purchase price for the same or any part thereof to give a good and binding receipt therefor, which receipt shall discharge and exonerate the person paying such money from the obligation of seeing to the application thereof, or being responsible in any manner for the loss or misapplication thereof.

I do hereby authorize my said attorney to sign and seal as my act and deed any instrument in writing, and to do every other thing necessary or proper for carrying into effect and execution any agreement of sale made by him in such manner that all my estate, right, title or interest in or to the land and appurtenances included in such agreement of sale, so that the same may be effectually and absolutely conveyed and assured to the purchaser or the respective purchasers thereof, his and their heirs and assigns forever, or unto such other person or persons and for such other estate or estates therein and in such manner and form as he or they shall direct or appoint. And I, the said ———, hereby declare that all and every the receipts, deeds, matters and things which shall be by him, my said attorney, executed, given, made or done for the aforesaid purposes, shall be as good, valid and effectual to all intents and purposes whatsoever as if the same had been signed, sealed, delivered, given, made or done by me in my own proper person. And I hereby undertake at all times to ratify whatsoever my said attorney shall lawfully do or cause to be done in or concerning the premises by virtue of these presents.

In witness, etc.

Form 514.

Power of Attorney Given by One Going Abroad to Manage His Real Estate and Other Interests.

Know all men by these presents, that I, A. B. of ———, being about to go abroad, hereby appoint C. D. of ———, to be my

attorney in my name, and on my behalf to manage and cultivate, or let upon lease for such period and upon such terms as he shall think fit, and to receive the rents of any or all of my lands, houses, and other buildings, or any part thereof; to cut timber for sale or repairs, and to erect, demolish, and repair buildings on any part of my real estate; to insure any such buildings against loss or damage by fire, and to make arrangements with tenants, and to accept surrenders of leases, and generally to deal with my real estate, or any part thereof, as fully and effectually as I myself could do if personally present and acting; and also to take all lawful proceedings by way of action, or otherwise, for recovery of rent in arrear, or for eviction of tenants; to commence and carry on, or to defend at law or in equity, all actions, suits, and other proceedings affecting my real estate or any part thereof, or affecting anything in which I or my real or personal estate may be in any wise concerned; and also to demand, sue for, enforce payment of, and receive and give discharges for all moneys, securities for money, debts, chattels, and other personal estate whatsoever now belonging or hereafter to belong to me; to settle and to compromise, and submit to arbitration, all accounts, claims, and disputes between me and any other person; and for all or any of the purposes aforesaid to execute all such instruments and do all such things as he shall think fit and proper; and, upon receipt of any moneys under these presents, to deposit the same in the ——— Bank, in my name; and to withdraw the same, from time to time, and to invest the same, or any part thereof, in my name or otherwise, in or upon any such investments or securities, and in such manner, as to him my said attorney shall seem proper; and also out of such moneys to pay any premiums upon policies of insurance, expenses of repairs or improvements, and other expenses in respect of any part of my real or personal estate, as to my said attorney shall seem proper; and to receive the dividends, interest, and income arising from my personal estate or any part thereof; and for the purposes aforesaid, or any of them, to sign my name to and execute and deliver on my behalf all checks, contracts, transfers, assignments, and instruments whatever; and also to appoint and remove at his pleasure any substitute for, or agent under him, in respect of all or any of the matters hereinabove mentioned, upon such terms as to my said attorney shall seem proper; and generally to act in relation to my estate and to the premises as fully and effectually in all respects as I myself could do if personally present; I hereby undertaking to ratify everything which my said attorney, or any substitute or agent appointed by him under the power in that behalf hereinbefore contained, shall do, or purport to do, by the authority of these presents. In witness, etc.

Form 515.

Power to Appoint Substitute.

Know all men by these presents, etc.

To substitute and appoint from time to time an attorney or attorneys under him, the said attorney, with the same or more restricted powers, and to remove at pleasure such substitute or substitutes, and appoint another or others in his or their place or stead.

Form 516.

Substitute to be Appointed if Attorney Becomes Incapable.

Know all men by these presents, etc.

And in case the said attorney shall die, or for any cause become incapable of acting as my attorney, I hereby appoint A. B. of ——— to be my attorney in the place and stead of the said attorney, with power to exercise all or any of the powers and authorities hereinbefore conferred on the said attorney, in as full and complete a manner in all respects as if the said substitute had originally been appointed the said attorney.

Form 517.

Substitution of Attorney—Another Form.

Know all men by these presents, etc.

And in case my said attorney shall die during my residence abroad, I do, by these presents, constitute and appoint the said A. B. of ——— my true and lawful attorney, for me and in my name, place and stead, after the decease of the said first attorney, and in my name, and as my act and deed, to make, sign, seal, execute, and deliver all such acts, deeds, devices, conveyances, assurances, matters, and things whatsoever, as the said first attorney by virtue of these presents is authorized to do or perform, I hereby granting and vesting the same powers and authorities in the said second attorney in as full and complete a manner, to all intents and purposes, as by virtue of these presents are hereinbefore granted unto and vested in the said first attorney; I hereby ratifying and confirming all and whatsoever my said attorneys, or either of them, shall lawfully do or cause to be done in the premises.

Form 518.

Appointment of Substitutes by Authority in a Power of Attorney.

Know all men by these presents, etc.

Whereas A. B., of ———, duly made and executed under his hand and seal a power of attorney, dated the ——— day of ———, 19—, whereby he appointed me his attorney, for him and in his name to perform the acts therein mentioned, with power from time to time to substitute any person or persons to act under me or in my place as attorney or attorneys in all or any of the matters aforesaid, and to revoke from time to time every such substitution and appointment at pleasure: Now I, the said ———, by virtue and in execution of the authority in that behalf contained in the said power of attorney, and of all other authority me hereunto enabling, do hereby appoint ——— and ——— of ———, and each of them, to be the attorneys and attorney, jointly and separately, of my said principal ———, for him and in his name, or in my name, to execute and perform all and every the matters and things mentioned and contained in the said power of attorney to me, in the same manner, and as fully and completely, as he my said principal, or as I might or could have done if personally present, and as they the said attorneys, or either of them, might or could have done if they had been appointed originally the attorneys jointly and severally of my said principal, in and by the said power of attorney, instead of me, I, the said ———, hereby confirming and agreeing to confirm whatsoever the said attorneys jointly, or either of them separately, shall do or cause to be done in and about the premises by virtue of these presents. In witness, etc.

Form 519.

Provision Validating Acts of Attorney After Principal's Death.

Know all men by these presents, etc.

I hereby declare that in case I should die this power of attorney shall, as to all matters and things which may after my death be done by my said attorneys, or any or either of them, by authority or under color, or in pursuance hereof, be as binding upon my executors and administrators as the same would have been upon me if living, unless my said attorneys or attorney had, previously to the doing of any such matters or things, received reliable intelligence of my death, so effectually to apprise him or them that their authority hereunder had ceased and terminated.

Form 520.

Revocation of Power of Attorney.

Know all men by these presents that the ——— power of attorney, executed by me on the ——— day of ——— A. D. 19—, and recorded in Book ——— of ——— of ——— County, State of ——— by which I constituted C. D. my attorney for the purposes in said power set forth, is hereby wholly revoked, cancelled and annulled. In witness whereof, I have hereunto set my hand and seal, etc.

Form 521.

Revocation of Power of Attorney, and Appointment of New Attorney.

Know all men by these presents that whereas by a power of attorney, dated, etc., under my hand and seal, I appointed A. B. of ——— to be my attorney, with the powers and authorities therein mentioned; and whereas I desire to revoke the powers given to the said A. B. as aforesaid, and to appoint C. D. of ——— to be my attorney in place of said A. B.:

Now, therefore, I do hereby revoke and make null and void all and singular the powers and authorities by the said recited power of attorney given to or conferred upon the said A. B.: provided always that the revocation herein contained shall not prejudice or affect anything lawfully done or caused to be done by the said A. B., or any substitute acting under him, in the exercise of any such powers or authorities as aforesaid in the interval between this revocation and the time of the same becoming known to him or his substitute. And I do hereby ratify and confirm anything lawfully done or caused to be done by the said A. B., or any substitute acting under him, in the exercise of any such powers or authorities, including anything so done or caused to be done in such interval as aforesaid.

And I do by these presents appoint C. D. of ——— my attorney, in my name to exercise and execute all or any of the powers or authorities by the said recited power of attorney given or conferred to or upon the said A. B., in as full and complete a manner, to all intents and purposes, as if the name of the said C. D. had been inserted in said recited power of attorney in the place of said A. B. named therein. (Clause of ratification may be added.) In witness, etc.

CHAPTER VII.

Party Wall Agreements.

F. 522. Party wall agreements.
523. Establishing wall as party wall.
524. Extension of present building. Party wall.
525. Grant of use of wall.
526. Stipulation as to party wall to be inserted in a deed of part of a lot.
527. Either party may build or extend wall.
F. 528. Same. Another form.
529. Agreement for party wall and division fence.
530. License to use wall of adjoining building.
531. Receipt of payment for party wall.
532. Agreement between adjoining owners respecting boundaries and rights of light and air.

Form 522.

Party Wall Agreement.

This agreement, made on the ——— day of ——— 19—, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part, witnesseth, that whereas the parties are the owners respectively of parcels of land which adjoin each other, and which are situated on the ——— side of ——— street, the ——— parcel being that belonging to the party hereto of the first part, and the ——— parcel being that belonging to the party hereto of the second part, and the dividing line between said adjoining parcels being a line parallel with ——— street, and distant therefrom ——— feet; and whereas the parties hereto desire that the wall that may be erected to separate the adjoining buildings which may be placed upon said adjoining parcels shall be a party wall: Now, therefore, in consideration of the premises, the said party of the first part, for himself, his executors, administrators, heirs, and assigns, and the said party of the second part, for himself, his executors, administrators, heirs, and assigns, agree each with the other as follows:

Whichever of said parties shall first build on their said respective parcels shall make the wall on the side adjoining the land of the other party ——— inches thick, and shall place the same one-

half on the land of each party hereto, and the same, when built, shall become and remain a party wall. The party so first building may, at his or their option, make said wall of greater thickness than ——— inches, but shall not place more than ——— inches of the thickness thereof upon the land of the other party without the consent of such other party.

After said wall shall have been built, either of said parties may at any time extend the same horizontally or vertically, may make such extension of greater thickness than ——— inches, and may add to the thickness of said wall or of any extension thereof already built, but not more than ——— inches of the thickness of any extension of said wall built by either party shall be placed upon the land of the other party without the latter's consent, and no part of any addition to the thickness of said wall, or of any extension thereof already built, which may be made by either of said parties, or by those claiming under him or them respectively, shall be placed upon the land of the other party without the latter's consent.

Said wall, whether as originally built or as restored, and any extension of or addition to the same, shall be built in a substantial and workmanlike manner, and shall conform in all respects to the laws regulating the construction of buildings in force at the time; and the party building any extension of or addition to said wall shall take all due measures, by carrying up flues or otherwise, to cause the least possible inconvenience to the other party, and shall do whatever work may be necessary to leave the building of the other party in as good condition as it was before.

Whenever either of said parties shall use the whole or any part of said wall, original or restored, or of any extension thereof, built by the other party, the one so using shall pay to the other party, or those claiming under him or them, who may be owners for the time being of the land of the party who built such wall or extension, one-half of the value at that time of so much of said wall, or of such extension, including the foundations under the same, as he or they may use.

In estimating the value of so much of said wall, original or restored, or of any extension thereof, as may be used, to ascertain the sum due, no part of the thickness of said wall, or of any extension thereof, in excess of ——— inches, shall be taken into consideration, unless, with the written consent of the party who is to make such payment, or of his predecessors in ownership, more than ——— inches of the thickness of said wall, or of such extension, shall have been placed upon his or their land, and then only to the extent of the additional thickness so consented to.

No claim shall be made by either of said parties, or of those claiming under them respectively, for payment in respect of any

addition to the thickness of said wall, original or restored, or of any extension thereof already built which may be made by him or them, unless, with the consent of the other party, or of those claiming under him or them, part of such addition shall have been placed upon the land of the latter, and only in case the same shall be used by the latter, and the sum paid by the one so using shall be one-half of the value at that time of so much of such addition as shall be used.

The parties hereto, for themselves, their successors, heirs, executors, administrators, and assigns, do covenant with each other that the agreements herein contained shall be covenants running with the land, and that the rights, duties, and obligations hereunto of each party, and of those claiming under him or them, shall cease with the termination of his or their ownership of said respective parcels of land, except the duties and obligations growing out of any erection or use made during ownership.

In witness whereof the parties have hereunto, and to another instrument of like tenor, set their hands and seals the day and year above written.

Form 523.

Establishing Wall as Party Wall.

This agreement, made and entered into this 10th day of February, 1905, by and between A. B., of the city of ———, county of ———, state of ———, as the party of the first part, and C. D., of the same place, as the party of the second part.

Witneseth: Whereas, the parties hereto own respectively two adjoining parcels of land, to-wit: the said party of the second part the west half of the east half, and the east half of west half of Lot No. Six, etc., in ———, and the party of the first part the lot of land immediately adjoining the same on the west, being the west twenty feet of Lot No. Six, etc., in the said block, etc., in said city of ———; and

Whereas, the party of the first part herein has erected a wall upon said boundary line; and

Whereas, it is desired that the parties hereto shall establish the same as a party wall;

Now, in consideration of the sum of ——— dollars, in United States Gold Coin, paid by the party of the second party to said party of the first part, the receipt whereof is hereby acknowledged, the said party of the first part does hereby grant, bargain, sell, convey and assign to the said party of the second part, his heirs and assigns forever, the right hereby to use the said wall as a party wall, and it is by the parties hereto agreed that either party, their

heirs or assigns, may rebuild the same in case of partial or total destruction thereof. Either party may add to said wall in height, depth, thickness or length, and in case of damage may repair, or in case of destruction rebuild said wall, or any portion thereof, carrying up flues and the like to leave the other party as near as may be in as good condition as before, using good materials and workmanship, and conforming to the building laws, and in case of repairs, one-half of the cost of such repairs shall be paid to the party making the same by the owner of the other parcel on demand, and one-half of any such rebuilt wall, or any addition made as aforesaid to any wall when used, shall be paid for like the original structure.

The party of the second part shall have the right and privilege of putting joists in said wall and using the same in all respects as a party wall between the premises of the parties hereto.

In witness whereof, etc.

Form 524.

Extension of Present Building. Party Wall.

This agreement, made and entered into this 6th day of March, 1905, by and between A. B. as the party of the first part, and C. D., as the parties of the second part, witnesseth:

Whereas, the parties hereto own respectively two adjoining parcels of land, to wit, the said party of the first part the west half of the east half and the east half of the west half of Lot No. Six, etc., in the city of ———, state of ———, and the parties of the second part a lot of land immediately adjoining the same on the east, described as east quarter of Lot No. Six, etc., in said city of ———; and

Whereas, the party of the first part is about to extend his present building on said lot, and it is desired that the wall dividing the said properties of the said parties shall be and remain as a party-wall;

Now, it is agreed by the parties hereto as follows: That the said wall which shall be constructed shall be twenty inches wide from the footing to the under side of the first floor joists, then sixteen inches to the second floor joists, then twelve inches to the fire-wall, the fire-wall to be eight inches.

It is understood and agreed that eight inches of said wall shall be upon the land of the party of the first part, and the balance of said wall shall be upon the land of the parties of the second part.

Said wall shall also have the necessary footings under the ground to support said wall. The said parties do respectively convey, one to the other, such easement, right and interest in and

to their respective parcels of land so as to make the said wall, when so constructed forever a party-wall.

The parties of the second part shall pay the sum of ——— dollars towards the construction of the said wall, and the party of the first part the balance. And the parties hereto do hereby grant unto each other, respectively, the right to use said wall as a party-wall, and it is by the parties hereto agreed that either party, their heirs or assigns, may build the same, in case of partial or total destruction thereof. Either party, their heirs or assigns, may add to said wall in height, depth, thickness or length, and in case of damage may repair, and in case of destruction rebuild said wall, or any portion thereof, carrying up flues and the like to leave the other party as near as may be in as good condition as before, using good materials and workmanship and conforming to the building laws, and in case of repair, one-half of the cost of such repairs shall be paid to the party making the same by the owner of the other parcel, on demand, and either party shall have the right to use said wall as a party-wall.

In witness whereof, etc.

Form 525.

Grant Use of Wall.

This indenture, made the ——— day of ——— in the year of our Lord ———, between A. B., party of the first part, and C. D., party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of ——— dollars, in Gold Coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns, forever, the use of the east half of the brick wall on the east of the brick building, situated in the west quarter of lot number six (6), etc., in the city and county of ——— in the state of ———, said building being now used by the party of the first part as a store, which is eighty (80) feet in depth, fronts on Locust street and is two (2) stories high.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, etc.

Form 526.

Stipulation as to Party Wall, to be inserted in a Deed of Part of a Lot.

Subject also to, and with the benefit of, stipulations hereinafter following, that is to say: one-half of all foundations, stone-work, wall, and fences in the ——— boundary line between said tract and the tract of land adjoining thereto belonging to the grantor, may and shall be placed on each of said tracts, and any owner of either of said tracts using and enjoying any part of said foundations, stone-work, wall, and fences built by the other, shall pay for such part the actual value of one-half of said foundations, stone-work, walls, and fences to the owner thereof.

Form 527.

Either Party May Build or Extend Wall.

This agreement, made this ——— day of ———, between A. B. of ———, in the state of C. D., and ——— of ———, in the state aforesaid, witnesseth, that the said parties, being owners of adjoining properties situated on the ——— side of ——— street, between ——— and ——— streets, in said ———, the boundary line between said properties being ——— feet ——— from the ——— line of ——— street, hereby mutually grant and covenant each for himself, and his heirs and assigns, to and with the other, and his heirs and assigns, that either party hereto, or his heirs or assigns, may build and erect a party wall of the thickness required by law on any part or the whole of the said boundary line between the said properties, which the other party, his heirs and assigns, shall have a right to use as herein provided, the middle line of which wall shall coincide with said boundary line; and either party hereto, or his heirs or assigns, may extend in any direction on said line any wall so built, and may rebuild the same in case of the partial or total destruction thereof; and when any portion of any wall so built, extended, or rebuilt shall be used by the party, or by their heirs or assigns of the party, by whom the portion of the wall so used was not constructed, he or they shall pay to the party who constructed the same, or to his heirs or assigns, one-half of the value at the time of such use of the whole thickness of the portion of such wall, including the foundation thereof, so used by him or them; and the sum so to be paid shall, until paid, remain a charge and lien upon the land of the party liable to pay the same; but no covenant herein contained shall be personally binding on any person or persons, except in

respect of breaches committed during his or their ownership of, or title to, the said properties. Whenever any party wall built under this agreement shall be extended in height, the chimneys previously built in such wall shall be carried up to a proper height, and any injury caused by such extension shall be repaired, all at the expense of the party making the extension; and in case of dispute as to any value before mentioned, the amount thereof shall be determined by arbitration and for that purpose shall be referred to two disinterested parties to be appointed one by each party hereto, or by his heirs or assigns, said referees, in case of disagreement, choosing a third person as arbiter. In witness, etc.

Form 528.

Same. Another Form.

Whereas A. B. of ———, in the county of ——— and state of ———, and C. D. of said ———, respectively own two adjoining tracts of land on the ——— side of ——— street, in ———, in the county of ——— and state aforesaid, the line dividing said tracts being ——— feet ——— from the ——— line of ——— street, which crosses the first named street at a right angle, the parcel owned by the said ——— lying ——— of said line; and whereas said parties desire to provide for the erection of a party wall on said line: Now this agreement, made this ——— day of ———, 19—, by and between said ———, party of the first part, and said ———, party of the second part, witnesseth:—

Whichever party first builds adjoining said line shall build and erect a wall thereon, of such length as such party shall see fit, the same to be of good materials and workmanship, and in conformity with the building laws for the time being in force; but not more than six inches of wall in thickness, with its proportion of the necessary foundation, shall be placed on land of the other party without his consent, and said wall, when so built, shall be and remain a party wall.

Whenever the owner for the time being of the other tract uses said wall or any part thereof, he shall pay to the person, at the time of such use, owning the tract first built upon, one-half of the then value of the entire structure of such wall, or so much thereof as he may use, including piles, or other foundations, or substructure and coping.

Either party may add to said wall in height, depth, thickness, or length, and in case of damage may repair, or in case of destruction rebuild, said wall and any addition thereto, carrying up flues and the like to leave the other party as near as may be in as good condition as before, and using good materials and workman-

ship, and conforming to the building laws, and doing work from his own side if the other side is built upon; and in case of repairs, one-half the cost of such repairs shall be paid to the party making the same by the owner of the other parcel, on demand; and one-half the value of any such rebuilt wall, or of any addition made as aforesaid to any wall, when used, shall be paid for like the original structure. No addition to the thickness is to be made by either on the land of the other unless such land is vacant, and in no event so as to cause, inclusive of such addition, more than six inches of wall, with its proportion of the necessary foundation, to be on land of the other party, without the consent of the latter.

Said parties mutually covenant, for themselves and their respective heirs and assigns, each to and with the other, his heirs, representatives, and assigns, to observe the above agreement, and that the covenants herein contained shall run with the land, but it is mutually agreed that no owner shall be responsible except for his acts or defaults while owner. In witness, etc.

Form 529.

Agreement for Party Wall and Division Fence.

This agreement, made on the ——— day of ———, 19—, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part, witnesseth, that whereas A. B. of ———, party of the first part, owns a parcel of land situate on the ——— side of ——— street, being the same conveyed to him by ———, by deed dated the ——— day of ———, 19—, and recorded, etc., and C. D. of ———, party of the second part, owns a parcel adjoining said first mentioned parcel and lying next to the same, the boundary line between the two parcels being ——— feet from ——— street, and parallel with said street; and whereas said parties desire that a party wall should be built and erected on the boundary line aforesaid: Now, therefore, said parties do mutually agree as follows:—

That whichever party shall first build adjoining said line shall erect a party wall thereon, half on each side thereof, of such depth as such party shall see fit, and of ——— inches in thickness, of good material and workmanship, and in conformity with the building laws for the time being in force, and shall keep the same in repair until used by the owner of the other parcel; after which the same shall be kept in repair at the joint expense of the owners of either parcel for the time being;

That whenever the owner for the time being of the other parcel shall use said wall, he shall pay to the person at the time of such use owning the parcel first built upon one-half of the then value

of such wall, or of so much thereof as he may use, including in the word "wall" aforesaid the piles, stone, and brick foundations, and any other substructure, together with the coping;

That either party, his heirs or assigns, owning on either side, may build said wall higher, thicker, or deeper, taking proper care not to injure the other owner, and doing the work wholly from his side, unless the other side be vacant, and doing all that may be necessary, as by carrying up flues and the like, to leave the other owner as near as may be in as good condition as before, and using good materials and workmanship, and conforming to existing building laws; and one-half the value of any such addition when used shall be paid for like the original structure; but nothing herein contained shall entitle either party to place more than six inches in width of any wall on the land of the other without the consent of the owner of such land for the time being;

That either party, and the heirs or assigns of either, owning on either side, may place a division fence upon any part or the whole of so much of the division line as may be unoccupied by the party wall, and the owner of the other lot for the time being shall, on demand, pay to the owner of the adjoining parcel who has erected such fence, one-half the value thereof;

That each party binds hereto himself, his heirs and assigns, owners of the respective premises, and the covenants hereof shall run with the land; but it is expressly agreed and understood that no owner shall be responsible for use unless the same began during his ownership, nor for any acts or omissions except his own.

In witness whereof the parties have hereto set their hands and seals the day and year first above written.

Form 530.

License to use Wall of Adjoining Building.

This agreement, made the ——— day of ———, 19—, by and between A. B. of ———, the party of the first part, and C. D. of ———, the party of the second part, witnesseth, that whereas said party of the first part owns the house and lot numbered ——— on ——— street, in the city of ———, and the said party of the second part owns the lot adjoining the same, on the ——— side thereof, on which last mentioned lot said party of the second part is about to erect a brick building, and desires permission to insert the beams and floor timbers thereof into the said ——— wall of the house belonging to the said party of the first part: Now, therefore, the said party of the first part, in consideration of the sum of ——— dollars to him paid, the receipt whereof is hereby acknowledged, doth hereby grant and covenant to and with the said

party of the second part, his heirs, executors, administrators, and assigns, that he and they may, in the erection of said brick building, insert the beams and floor timbers thereof into the said ——— wall of the house aforesaid, and that the same may there remain so long as said wall shall stand. The covenants aforesaid are to run with the land and to bind the parties hereto, their heirs and assigns. In witness, etc.

Form 531.

Receipt of Payment for Party Wall.

Know all men by these presents, that I, A. B., named in a certain agreement between C. D. and myself as to a party wall on the line between our respective holdings described in said agreement, dated the ——— of ———, 19—, and recorded with ——— county deeds, book ———, page ———, do hereby acknowledge that I have received from E. T., successor in title of said C. D., the sum of ——— dollars, in full payment for that portion of the ——— half of said wall used by him up to date, and to a depth of ——— feet from the front line of his house, and do hereby discharge, acquit and release him from all obligation of payment for said portion of said wall, said agreement remaining otherwise in full force. Witness my hand and seal this ——— day of ———, 19—.

Form 532.

Agreement between Adjoining Owners Respecting Boundaries and Rights of Light and Air.

This indenture is made the ——— day of ———, between A. B., owner in fee, of the first part; C. D., his mortgagee, of the second part; and E. F., adjoining owner, of ———, of the third part.

Whereas, said party of the first part is the owner in fee simple of the land and premises marked with his name and colored red on the plan hereto attached;

And whereas, said E. S., is the owner in fee simple of the land and premises marked with his name and colored blue on said plan;

And whereas, disputes have arisen between said owners concerning the boundaries of their respective premises, and their respective rights of light and air, the said parties, for the purpose of determining such disputes and defining their respective rights, have entered into the mutual covenants, stipulations and declarations herein contained.

Now, this indenture witnesseth, that in consideration of this agreement, and of the covenants, stipulations and declarations

hereinafter contained, each of the said parties hereby covenants with each of the others, his heirs and assigns, in the manner following:

The wall shown on said plan, dividing the respective properties of said owners, shall become and remain a party wall, and the common property of said owners, their respective heirs and assigns; so that either of them shall be at liberty to use said wall by inserting timbers or other material up to, but not beyond, a vertical line drawn through the center and along the entire length of said wall, or otherwise to use the said wall in any manner that may interfere with the equal use of the other half of the wall by the other owner.

Nothing herein contained shall interfere with the right of each of said adjoining owners, their respective heirs and assigns, to carry up the buildings on their own side of said wall to any height, and for that purpose they may extend the height of said wall.

The open area, colored green on said plan, shall remain of not less dimensions than as shown on said plan, open, unobstructed, and not built upon; but nothing herein contained shall prejudice the right of each of said parties, their respective heirs and assigns, to carry up the buildings on their own respective side of said area to any height whatsoever.

CHAPTER VIII.

Bonds for Deeds, Options, Contracts for Sale of Real Estate, Etc.

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Form 533.

Bond for a Deed.

Know all men by these presents: That ——— held and firmly bound unto ——— in the sum of ——— dollars, ——— of the United States of America, to be paid to the said ——— executors, administrators or assigns; for which payment, well and truly to be made, ——— bind ——— heirs, executors and administrators ——— firmly by these presents. Sealed with ——— seal——— and dated the ——— day of ——— one thousand eight hundred and eighty- ———

The condition of the above obligation is such, that if the above bounden obligor ——— shall, on ——— the ——— day of ——— A. D. one thousand eight hundred and eighty- ———, make, execute and deliver unto the said ——— (provided that the said ——— shall on or before that day have paid to the said obligor— the sum of ——— dollars, ——— the price by said ——— agreed to be paid therefor), a good and sufficient conveyance, with the usual covenants ——— of all th— certain lot—, piece— or parcel— of land, situate, lying and being in the ——— county of ———, and state of ———, and bounded and particularly described as follows, to wit: ——— then this above obligation to be void, otherwise to remain in full force and virtue.

Form 534.

Bond for a Deed. Another Form.

Know all men by these presents that I, A. B. of ———, am held and firmly bound unto C. D. of ——— in the sum of ——— dol-

lars, lawful money of the United States of America, to be paid to the said C. D., or to his certain attorney, heirs, executors, administrators, or assigns, to which payment well and truly to be made I do bind myself, my heirs, executors, administrators, or assigns, and each and every one of them, firmly by these presents.

Sealed with my seal. Dated the ——— day of ———, A. D. 19—.

The condition of this obligation is such, that if the above bounden A. B., his heirs, executors, administrators, or assigns, shall make, execute, acknowledge and deliver to the said C. D., or his heirs, executors, administrators, or assigns, a good and sufficient warranty deed, duly witnessed, conveying all that certain piece or parcel of land bounded and described as follows, etc., on or before the ——— day of ———, A. D. 19—; and moreover if the said C. D., his heirs, executors, administrators, or assigns, pay to the said A. B. ——— dollars for the said land as follows, ——— instalments of ——— dollars each, one instalment on the ——— day of ———, and one instalment on the ——— day of ———, in each year, until the whole amount shall be paid, with interest from the date hereof on the amount remaining unpaid at the rate of ——— per cent, per annum, payable semi-annually with the said several instalments,—then these presents to be null and void; otherwise to remain in full force and virtue.

Form 535.

Agreement for Sale of Real Estate.

This agreement, made and entered into this ——— day of ——— in the year of our Lord one thousand eight hundred and ninety- ——— between ——— the part— of the first part, and ——— the part— of the second part, witnesseth:—

That the said part— of the first part, in consideration of the covenants and agreements on the part of the said part— of the second part hereinafter contained, agree— to sell and convey unto the said part— of the second part, and said second part— agree— to buy all th— certain lot— or parcel— of land, situate in the ——— county of ——— and state of ——— and bounded and particularly described as follows, to wit: ——— for the sum of ——— dollars, ——— of the United States; and the said part— of the second part, in consideration of the premises, agree— to pay at the time and in the manner hereinafter mentioned, to the said part— of the first part, the sum of ——— dollars, ——— as follows, to wit:—

And the said part— of the second part agree— to pay all state

——— and county taxes, or assessments of whatsoever nature, which may become due on the premises above described.

In the event of a failure to comply with the terms hereof, by the said part— of the second part, the said part— of the first part may be released from all obligations in law or equity to convey said property, and the said part— of the second part shall forfeit all right thereto, and all money theretofore paid thereon, shall be as liquidated damages for the non-fulfillment hereof by the part— of the second part. And the said part— of the first part, on receiving such payment, at the time and in the manner above-mentioned, agree— to execute and deliver to the said part— of the second part, or to ——— assigns, a good and sufficient deed conveying said land free and clear of all incumbrances made, done or suffered by the said part— of the first part.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties, and that time is of the essence of this contract.

In witness whereof, etc.

Form 536.

Agreement for the Sale of Real Estate, Another Form.

This agreement, made this ——— day of ——— in the year of our Lord nineteen hundred and ——— between ——— of ——— county of ———, state of ———, hereinafter designated as the Seller and ——— of ——— county of ——— state of ——— hereinafter designated as the Buyer, witnesseth:—

That the said Seller, in consideration of the covenants and agreements hereinafter contained and made by and on the part of said Buyer, agrees to sell and convey unto the said Buyer, and said Buyer agrees to buy all th— certain lot—, piece—, or parcel— of land, situate, lying and being in the ——— county of ——— and State of ——— and bounded and particularly described as follows, to-wit: ——— as per map of said ——— now on record in book ——— ——— at page ——— county for the sum of ——— dollars ——— of the United States; and the Buyer in consideration of the premises, agrees to buy and pay to the Seller, the said sum of ——— dollars as follows, to-wit: ——— dollars upon execution and delivery of this agreement, receipt of which is hereby acknowledged, and the further sum of ——— dollars on the ——— day ———, 19—, and ——— with interest at the rate of ——— per cent per annum payable ——— from date. Taxes for the current year to be paid by ——— agrees to pay all assessments levied subsequent to date hereof.

It is understood and agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof, by the Buyer, then the Seller shall be released from all obligations in law and equity, to convey said property, and the Buyer shall forfeit said right thereto and to all moneys theretofore paid under this contract; but the Seller on receiving the full payments at the times and in the manner above mentioned, agrees to deliver a certificate of title showing the title to be vested in ——— and to execute and deliver to the Buyer or ——— assigns, a good and sufficient Deed of Grant, Bargain and Sale.

In witness whereof, etc.

Form 537.

Contract for Sale of Real Estate. Purchaser to Pay Taxes.

Know all men by these presents, that this agreement, made and entered into on this ——— day of ——— in the year 190— by and between ——— hereinafter known as "the seller—" and ——— hereinafter known as "the purchaser—" witnesseth:—

That in consideration of the payment of the sum of ——— dollars, the receipt of which is hereby acknowledged, and the payment of the additional sum of ——— dollars, in United States gold coin by the purchaser— to the seller— as hereinafter stipulated and agreed to be paid, with interest thereon, the seller— agrees to sell to the purchaser— all that real property, situate lying and being in the city of ——— county of ———, in the state of ———, known, designated and described as follows, to-wit: ———. Together with the improvements and the hereditaments and the appurtenances thereunto belonging or in anywise appertaining. And the purchaser—, in consideration of the premises, hereby agrees to purchase the hereinbefore described real property, and pay therefor to the seller— or said seller—, heirs, administrators or assigns, in addition to the amount already paid, the additional sum of ——— dollars in United States gold coin, as follows, to-wit:

The sum of not less than ——— dollars, on the ——— day of each and every month, commencing with the day first herein mentioned, and so continuing until the total selling price of the property shall be paid in full.

——— together with interest thereon on deferred payments from this date until paid, at the rate of ——— per cent. per annum, payable monthly, in like gold coin. But if not paid when due, it shall draw interest at the rate of twelve per cent. per annum until paid. And it is further agreed that in case of a default in the payment of any of said sums, or any instalments or interest

due thereon for the period of two ——— months after they become due, that all money previously paid by the purchaser— shall, at the option of the seller— become forfeited to the seller— and retained as settled and liquidated damages; the parties hereto agreeing that it is impossible to estimate the actual damages, and thereupon the seller— shall be released from all obligations in law and equity to convey said real property, and the purchaser— shall forfeit all right thereto, and shall immediately deliver the possession of it to the seller—; and herein it is agreed that time is the essence of this contract. And it is further agreed that the purchaser— shall keep the improvements on said premises insured for three-fourths of their cash value, in the name and for the benefit of the seller—, in a company previously approved by the seller—; and in case of default of said purchaser— failing to keep said improvements insured as aforesaid, then the seller— may cause them to be insured at the expense of the purchaser—. All improvements, buildings and structures now upon said lot of land hereinbefore described, or that may hereafter be placed or built thereon, shall belong to said seller— until deed is made to the purchaser—. Said purchaser— shall not have the right to sell, move or encumber the same until the execution of the deed.

And the purchaser— is entitled to the possession of said premises, and may so continue, unless forfeited by the non-payment of the purchase money or any instalments thereof, or interest or other payments as herein stipulated. And in consideration of the purchaser— having the possession and occupancy of said real estate, said purchaser— shall pay all taxes and assessments that become a lien against it on and after the ——— day of ——— 190— in addition to the purchase money and insurance. And if the purchaser— should fail to pay any taxes or assessments, as herein specified, the seller— may pay them, and all moneys so paid shall become a debt, against the purchaser—, and the purchaser— will, on demand, repay the seller— in gold coin, all moneys paid by the seller— for any taxes or assessments of any kind, or to obtain any insurance, with interest thereon from date of payment until repaid, at the rate of twelve per cent per annum, and said payments shall be secured by this contract.

And the seller— on receiving the full payment of all the purchase money and interest thereon, and all advances made by said seller— for taxes, insurance or otherwise, with interest as herein agreed to be paid, agrees that he will convey all said real property by deed to the purchaser— by good title, free from all incumbrances, except such liens or incumbrances as may be caused by the acts or negligence of the purchaser—, and taxes and assessments that become a lien as hereinbefore stated.

If the real estate described in this contract be situate outside

of the corporate limits of the city of ———, and there be growing crops on said land, the crops and the right to harvest said crops is hereby reserved to the seller— and to any person or persons with whom the seller— may have contracted regarding said crops, and to any lessee of the seller, and the possession given by this contract, as hereinbefore mentioned, shall be subject to the rights of the seller— and the said grower of said crops, or said lessee accordingly. If the title to the real estate described in this contract be acquired through a patent from the Government of the United State, or a conveyance from the Central Pacific Railroad Company, or any other Railroad Company, then the conveyance hereunder when made, shall be of a good title as above stated, but subject, however to any reservations regarding mineral, rights of way for railroads, or any other reservations which may be made in such conveyance.

If it be ascertained that the seller— can not convey the property by good title free from the incumbrances above mentioned, then upon written notice from the buyer notifying him of the imperfections of the seller's title the latter shall have six months after said notice in which to perfect said title.

And it is further agreed and understood that this contract is to apply to and bind the heirs, administrators and assigns of the respective parties hereto.

In witness whereof, etc.

Form 538.

Contract to Sell Real Estate in a Subdivision.

Know all men by these presents, that this agreement, made and entered into on this ——— day of ——— in the year 191— by and between A. B. Company, a corporation, ——— hereinafter known as "the seller," and ——— hereinafter known as "the purchaser." Witnesseth:—

That in consideration of the payment of the sum of ——— dollars, the receipt of which is hereby acknowledged, and the payment of the additional sum of ——— dollars, in United States gold coin by the purchaser to the seller as hereinafter stipulated and agreed to be paid, with the interest thereon, the seller agrees to sell to the purchaser all that real property, situate, lying and being in the ——— county of ———, state of ———, known, designated and described as follows, to-wit:

Lot number ——— (in words) No. ——— (in figures) of ——— or A. B. Company's Subdivision——— Number ———, reference being hereby made to the map thereof on file in the office of the County Recorder of said county.

(*Description*) Together with the improvements and the hereditaments and the appurtenances thereunto belonging or in anywise appertaining. And the purchaser, in consideration of the premises, hereby agrees to purchase the hereinbefore described real property, and pay therefor to the seller or said seller's successors, heirs, administrators, or assigns, in addition to the amount already paid, the aforesaid additional sum of ——— dollars, as follows, to-wit:

The sum of not less than ——— dollars, on the first day of each and every month, commencing with the day first herein mentioned, and so continuing until thirty ——— per cent. of the total selling price of the property shall be paid in full, whereupon the entire remaining debt, to wit: Seventy per cent thereof, shall become due and payable immediately, together with interest thereon from this date until paid, at the rate of six per cent. per annum, payable monthly, in like gold coin. But if not paid when due, it shall draw interest at the rate of twelve per cent. per annum until paid. And it is further agreed that in case of a default in the payment of any of said sums, or any installments or interest due thereon, for the period of two months after they become due, that all money previously paid by the purchaser shall, at the option of the seller, become forfeited to the seller, and retained as settled and liquidated damages; the parties hereto agreeing that it is impossible to estimate the actual damages, and thereupon the seller shall be released from all obligations in law and equity to convey said real property, and the purchaser shall forfeit all right thereto, and shall immediately deliver the possession of it to the seller; and herein it is agreed that time is the essence of this contract. And it is further agreed that the purchaser shall keep the improvements on said premises insured for three-fourth of their cash value, in the name and for the benefit of the seller, in a company previously approved by the seller; and in default of said purchaser so keeping said improvements insured as aforesaid, then the seller may cause them to be insured at the expense of the purchaser. All improvements, buildings and structures now upon said lot of land hereinbefore described, or that may hereafter be placed or built thereon, shall belong to said seller until the deed is made to the purchaser. Said purchaser shall not have the right to sell, move or incumber the same until the execution of the deed.

And the purchaser is entitled to the possession of said premises, and may so continue, unless forfeited by the non-payment of the purchase money, or any installments thereof, or interest or other payments as herein stipulated. And in consideration of the purchaser having the possession and occupancy of said real estate, said purchaser shall pay all taxes and assessments that became a

lien against it on and after the first day of January of the year first herein written, in addition to the purchase money and insurance. And if the purchaser should fail to pay any taxes or assessments, as herein specified, the seller may pay them, and all moneys so paid shall become a debt against the purchaser, and the purchaser will, on demand, repay to the seller, in gold coin, all money paid by the seller for any taxes or assessments of any kind or to obtain any insurance, with interest thereon from date of payment until repaid, at the rate of twelve per cent. per annum, and said payments shall be secured by this contract.

And the seller, on receiving the full payment of all the purchase money, and interest thereon, and all advances made by said seller for taxes, insurance or otherwise, with interest as herein agreed to be paid, and upon the payment of all sums of money which may be due the "seller," his or its successor and assigns, or any of them, agrees that said seller will convey all said real property by deed to the purchaser, by good title, free from all incumbrances except such liens or incumbrances as may be caused by the acts or negligence of the purchaser, and taxes and assessments that became a lien as hereinbefore stated.

If the Real Estate described in this Contract be situate inside or outside the corporate limits of the city of ———, and there be crops now growing on the said land, the crops and the right to harvest said crops at present growing is hereby reserved to the seller and to any person or persons with whom the seller may have contracted regarding said crops, and to any lessee of the seller, and the possession given by this contract, as hereinbefore mentioned, shall be subject to the rights of the seller and of the said grower of said crops, or said lessee accordingly. If the title to the real estate described in this Contract be acquired through a patent from the Government of the United States, or a conveyance from the E. F. Railroad Company, or any other Railroad Company, then the conveyance hereunder when made, shall be of a good title as above stated, but subject, however, to any reservations regarding mineral, rights of way for railroads, or any other reservations which may be made in such conveyance. If it be ascertained that the seller cannot convey the property by good title, free from incumbrances above mentioned then upon written notice from the buyer notifying him of the imperfections of the sellers' title, the latter shall have one year after said notice in which to perfect said title. The seller reserves to itself, its successors and assigns, the right, at its option, to plant trees, oil streets, grade streets, and in any other way improve the streets, roads and alleys in front of, or surrounding the above described realty. It is mutually agreed that this contract shall not be transferable without the written consent of the seller. The seller does

hereby reserve to himself, his heirs, successors and assigns a perpetual right of way for water, sewer and gas pipes over a strip of land four feet wide, extending across the narrowest direction of said lot and at a point furtherest removed from street in front of the same.

And it is further agreed and understood that this contract is to apply to and bind the heirs, administrators and assigns of the respective parties hereto.

In witness whereof, etc.

Form 539.

Assignment of Contract.

For value received the undersigned, holder of the within described contract and therein designated as the "buyer" does hereby assign, transfer and set over unto ——— hereinafter called the "assignee," all the right, title and interest of the undersigned as the "buyer" thereunder subject to the approval of the "seller" and the undersigned does hereby direct the "seller" to execute deed at final payment to such assignee. ———, Assignor and Former "Buyer."

The undersigned, the assignee above named, hereby accepts the above assignment and agrees to perform all the covenants and agreements therein to be performed by the buyer. ———, Assignee and New "Buyer."

In consideration of the sum of one dollar, A. B. Company, the "seller" hereunder hereby consents to the above assignment. A. B. Company.

Form 540.

Contract to Sell Real Estate in Reclamation District. Subject to Leases, Sellers to Vote for Trustees.

Know all men by these presents, that this agreement, made and entered into on this ——— day of ——— in the year 1910, by and between A. B. Company, a corporation, and ———, hereinafter known as the "seller," and ——— hereinafter known as the "purchaser."

Witnesseth: That in consideration of the payment of the sum of ——— dollars, the receipt whereof is hereby acknowledged and the payment of the additional sum of ——— dollars, in United States gold coin by the purchaser to the seller as hereinafter stipulated and agreed to be paid, with the interest thereon, the seller agrees to sell to the purchaser all that real property, situate, lying

and being in the county of ———, state of ———, known, designated and described as follows, to-wit:

(*Description*) Together with the improvements and the hereditaments and the appurtenances thereunto belonging or in anywise appertaining. And the purchaser in consideration of the premises, hereby agrees to purchase the hereinbefore described real property, and pay therefor to the seller or said seller's successors, heirs, administrators, or assigns, in addition to the amount already paid, the aforesaid additional sum of ——— dollars, in six equal payments, as follows, to-wit:

The sum of one-sixth of the remainder of the said purchase price on July 1st, 191—; another one-sixth thereof on October 1st, 191—; another one-sixth thereof on July 1st, 19—; another one-sixth thereof on October 1st, 191—; another one-sixth thereof on July 1st, 191—; and the final one-sixth thereof on October 1st, 191—. If any such installment of said purchase price shall not be paid when due, as aforesaid, the same shall bear interest from the date when it so becomes due, until paid, at the rate of twelve per cent per annum.

And it is further agreed that in case of a default in the payment of any of said sums, or any installments or interest due thereon, for the period of two months after they become due, that all money previously paid by the purchaser shall, at the option of the seller, become forfeited to the seller, and retained as settled and liquidated damages; the parties hereto agreeing that it is impossible to estimate the actual damages, and thereupon the seller shall be released from all obligations in law and equity to convey said real property, and the purchaser shall forfeit all right thereto, and shall immediately deliver the possession of it to the seller; and herein it is agreed that time is the essence of this contract. And it is further agreed that the purchaser, from the time he shall be entitled to possession of said premises as hereinafter provided, shall keep the improvements on said premises inured for three-fourths of their cash value, in the name and for the benefit of the seller, in a company previously approved by the seller; and in default of said purchaser so keeping said improvements insured as aforesaid, then the seller may cause them to be insured at the expense of the purchaser. All improvements, buildings and structures now upon said lot of land hereinbefore described, or that may hereafter be placed or built thereon, shall belong to said seller until the deed is made to the purchaser. Said purchaser shall not have the right to sell, move or incumber the same until the execution of the deed.

The purchaser recognizes that all of the property herein described is now held under leases made by the seller, or by seller's predecessor in interest, and it is expressly agreed that the seller shall have the right at his option to continue said leases and to

make other leases for the period of four years from the date hereof, and that during such time the purchaser shall not have the right to the possession of said property or any interest in the crops grown thereon. Upon the expiration of said leases, or four years from the date hereof, the purchaser shall have the right to the possession of said premises, provided, however, that if said leases expire prior to four years from the date hereof, the seller shall notify the purchaser thereof, personally, or by a written notice mailed to his last known place of residence, and in consideration of such right of possession the purchaser agrees to pay interest monthly on the first day of each and every month at the office of the seller, in ———, state of ———, on all deferred payments that may be due or become due after such right of possession shall accrue, as aforesaid, at the rates of six per cent. per annum from the date such right of possesion shall accrue, and also in consideration of such right of possession said purchaser shall pay all taxes and assessments that become a lien against it, on and after the day such right of possession shall accrue, in addition to the purchase money and insurance. And if the purchaser should fail to pay any taxes or assessments, as herein specified, the seller may pay them, and all moneys so paid shall become a debt against the purchaser, and the purchaser will, on demand, repay to the seller, in gold coin, all money paid by the seller for any taxes or assessments of any kind or to obtain any insurance, with interet thereon from date of payment until repaid, at the rate of twelve per cent. per annum, and said payments shall be secured by this contract.

It is further agreed, that whereas, the said property is situated within Reclamation District No. 1, ——— county, state of ———, and all assessments levied by said district prior to or due prior to May 1st, 1910, have been paid by the seller, the purchaser agrees to pay thirty days before maturity, or thirty days before the date when due, any and all assessments or calls on assessments that may hereafter be levied or made upon said premises by the said Reclamation District or any other Reclamation District within which said lands may be included, and if the purchaser should fail to pay any such assessments, as herein specified, the seller may pay them, and all moneys so paid shall become a debt against the purchaser, and the purchaser will, on demand, repay to the seller, in gold coin, all money paid by the seller for any such assessments, with interet thereon from date of payment until repaid, at the rate of twelve per cent. per annum, and said payments shall be secured by this contract.

It is further agreed, that whereas, E. F., G. H., I. J. and K. L. are the owners of other lands situate in said Reclamation District No. 1, and, as such owners, have material interests in the election of the Trustees and the management of the affairs of said

district, the said E. F., G. H., I. J. and K. L., or any, or either of them, shall have, hold and retain the right to vote the said land at any and all elections held in said Reclamation District, or any other reclamation district within which the same may be included, so long as the said parties last above named, or any, or either of them, shall own in the aggregate fifty acres of, or within, the lands comprising the said Reclamation District No. 1, whether a deed to the purchaser, as herein provided, be or be not made, and the purchaser does hereby, and as a part consideration for the making of this agreement, and the sale to him of said premises, hereby makes, constitutes and appoints the said parties last above named, jointly and severally, his true and lawful attorneys in fact to vote the said land at any and all elections held in said Reclamation District last above referred to, during such time as said parties, or any, or either of them, may own, in the aggregate, at least fifty acres of land in the now said Reclamation District No. 1.

It is further agreed that the seller shall, at all times, have the right to enter on said premises, although the purchaser be entitled to the possession thereof under the term of this agreement, and to erect thereon such works of reclamation as said seller may deem necessary or expedient, including canals, ditches, laterals, etc., and the seller shall also have the right to convey to said Reclamation District such portion of said property hereinbefore described as it may deem necessary for reclamation purposes, but in case the seller shall so do, then the purchaser shall be entitled to a rebate or deduction from the said purchase price, in such proportion of the total selling price as the acreage conveyed to said district bears to the total acreage which is the subject of this contract.

It is further agreed that the seller shall have and hereby retains the right to open roads through the said premises as it may deem best, and to dedicate the same to public use, or to retain the same as private roads and the purchaser shall not be entitled to any compensation, or discount, or allowance for any portion of said premises so taken or withheld.

And the seller, on receiving the full payment of all the purchase money, and interest thereon, and all advances made by said seller for taxes, insurance, reclamation assessments, or otherwise, with interest as herein agreed to be paid, and upon the payment of all sums of money which may be due the seller, his or its successor and assigns, or any of them, agrees that said seller will convey all said real property by deed to the purchaser, by good title, free from all incumbrances, except such liens or incumbrances as may be caused by the acts or negligence of the purchaser, and taxes and assessments that became a lien as hereinbefore stated.

If there be crops now growing on the said land at the time the

purchaser is entitled to possession, the crops and the right to harvest said crops at present growing is hereby reserved to the seller and to any person or persons with whom the seller may have contracted regarding said crops, and to any lessee of the seller, and the possession given by this contract, as hereinbefore mentioned, shall be subject to the rights of the seller and of the said grower of said crops, or said lessee accordingly. If the title to the real estate described in this contract be acquired through a patent from the Government of the United States, or a conveyance from the Central Pacific Railroad Company, or any other Railroad Company, then the conveyance hereunder when made, shall be of a good title as above stated, but subject, however, to any reservations regarding mineral, rights of way for railroads, or any other reservations which may be made in such conveyance. If it be ascetained that the seller cannot convey the property by good title, free from all incumbrances above mentioned, then upon written notice from the buyer notifying him of the imperfections of the sellers' title, the latter shall have one year after said notice in which to perfect said title. The seller reserves to itself, its successors and assigns, the right, at its option, to plant trees, oil roads, grade roads, and in any other way improve the roads in front of, or surrounding the above described realty. It is mutually agreed that this contract shall not be transferable without the written consent of the seller.

Wherever in this contract the words, "Reclamation District No. 1," occur, they shall be construed to mean any other reclamation district hereafter formed, in which above described lands may be situated, or any district with which said Reclamation District No. 1 may be consolidated.

And it is further agreed and understood that this contract is to apply to and bind the heirs, administrators, successors and assigns of the respective parties hereto.

In witness whereof, we, the said parties, have hereunto set our hands and seals the day and year in this instrument first above written.

A. B. COMPANY,

.....(Seal) By .....President.

.....(Seal)

Form 541.

Assignment of Contract.

For value received, the undersigned, holder of the within described contract and therein designated as the "buyer" does hereby assign, transfer and set over unto ——— hereinafter called the

"assignee," all the right, title and interest of the undersigned as the "buyer" thereunder subject to the approval of the "seller" and the undersigned does hereby direct the "seller" to execute deed at final payment to such assignee. ——— Assignor and Former "Buyer."

The undersigned, the assignee above named, hereby accepts the above assignment and agrees to perform all the covenants and agreements therein to be performed by the buyer. ——— Assignee and New "Buyer."

In consideration of the sum of One Dollar, the seller hereunder hereby consents to the above assignment.

A. B. COMPANY,
By .....President.
Secretary.
.....(Seal)

Form 542.

Agreement for Sale of Real Estate. General Form.

This agreement, made and entered into this ——— day of ——— in the year of our Lord one thousand eight hundred and ninety- ——— between ——— the part— of the first part, and ——— the part— of the second part, witnesseth:—

That the said part— of the first part, in consideration of the covenants and agreements on the part of the said part— of the second part hereinafter contained, agree— to sell and convey unto the said part— of the second part, and said second part— agree— to buy all th— certain lot— or parcel— of land, situate in the ———county of ——— and state of ——— and bounded and particularly described as follows, to-wit:—

(*Description*) for the sum of ——— dollars, ——— of the United States; and the said part— of the second part, in consideration of the premises, agree— to pay at the time and in the manner hereinafter mentioned, to the said part— of the first part, the sum of ——— dollars, ——— as follows, to-wit:—

And the said part— of the second part agree— to pay all State and County taxes, or assessments of whatsoever nature, which may become due on the premises above described.

In the event of a failure to comply with the terms hereof, by the said part— of the second part, the said part— of the first part may be released from all obligations in law or equity to convey said property, and the said part— of the second part shall forfeit all right thereto, and all money theretofore paid thereon, shall be as liquidated damages for the non-fulfillment hereof by the part— of the second part. And the said party— of the first part, on re-

ceiving such payment, at the time and in the manner above-mentioned, agree— to execute and deliver to the said part— of the second part, or to ——— assigns, a good and sufficient Deed conveying said land free and clear of all incumbrances made, done or suffered by the said part— of the first part.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties, and that time is of the essence of this contract.

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Form 543.

Option for Sale of Real Estate.

This agreement, made this ——— day of ———, 19—, between A. B. of ———, hereinafter called the real estate company, and C. D. of ———, hereinafter called the seller, witnesseth: ———

In consideration of ——— dollars, the receipt of which is hereby acknowledged, said seller hereby agrees to grant and convey by warranty deed to said real estate company or to any person, persons or corporation said company may designate in writing, at any time that it may demand on or before the ——— day of ———, 19—, for the sum of ——— dollars, to be paid according to the following terms (*terms to be inserted*), all that certain piece or parcel of real estate situated in ———, county of ———, state of ———, more particularly described as follows: (*Description.*) Said seller hereby does agree to deliver to said real estate company or any one whom it may designate a good merchantable abstract of title on or before the ——— day of ———, 19—, and to give said Real Estate Company or any one by it designated, complete and peaceable possession of said premises on or before the ——— day of ———, 19—.

In witness, etc.

Form 543.

Option for Sale of Real Estate.

In consideration of ——— dollars, the receipt whereof is hereby acknowledged, I do hereby agree to give A. B. the option to buy the following described real estate in the county of ———, state of ———, to wit: (*Describe real estate.*)

Said A. B. shall have the right to close this option at any time within six months from date, and I agree to make, execute and deliver to him or any person named by him, a good warranty deed

to said real estate, and to furnish and deliver therefor an abstract of title showing said title to be perfect, upon demand therefor. Upon the execution of said deed and abstract, I shall be paid the sum of ——— dollars as full payment of the purchase price of said real estate. I further agree neither to sell nor encumber said real estate during said term, and should I do so I will forfeit ——— dollars to said A. B. as settled and liquidated damages. Likewise, should I fail, neglect or refuse to make said deed, or to furnish said abstract as above provided, I will forfeit to him as settled and liquidated damages ——— dollars. I waive all claims of any and every kind for damages for failure to close this option.

Form 544.

Agreement for Sale of Real Estate and Buildings.

Agreement made the ——— day of ———, 19—, between ——— of ———, hereinafter called the owner, of the first part, and ——— of ———, hereinafter called the purchaser, of the second part.

The said owner hereby agrees to sell, and the said purchaser hereby agrees to purchase, for the sum of ——— dollars, all that parcel of land, with the buildings thereto belonging, situate at ———, in the county of ———, bounded and described as follows: All which said premises are delineated in the plan hereto annexed, and signed by both parties hereto: together with all the rights, easements, and appurtenances hereunto belonging, or in any wise incident or appertaining.

The owner also agrees that he will at his own cost and expense prepare, and within ——— days from date hereof deliver to the said purchaser, or to his attorneys, an unexecuted deed of said premises, or will furnish him with other sufficient information to enable him to examine the title to the said premises.

If the purchaser should point out and insist on any objection to the title or conveyance which the owner may be unable or unwilling to remove or comply with, the owner may at any time rescind this agreement of sale, and in such event he agrees to return the deposit to the purchaser, who it is hereby agreed shall not be entitled to any interest, damages, or costs.

If before the actual conveyance of the property but not afterwards any error or omission affecting the quantity of land shall be discovered in the description of the property, compensation shall be allowed or given as the case may require.

A deposit of ——— dollars of the purchase money shall be paid by the purchaser to the owner at the time of signing and executing this agreement, and the balance of the purchase money shall be

paid to him on the ——— day of ——— next, at the office of his attorney, or as the owner shall direct; and thereupon the owner and all other necessary parties, if any, shall execute a proper conveyance of the premises to the purchaser in fee simple, free from all liens and incumbrances.

Possession of said premises shall be delivered to said purchaser on the said ——— day of ———, and as and from that day all rents, taxes, or other income or charges shall, if necessary, be apportioned between the owner and purchaser.

If from any cause whatever, except from the wilful neglect or default of the owner, the completion of the purchase shall be delayed beyond the said ——— day of ———, the purchaser shall pay interest at the rate of ——— per cent. per annum on the balance of his purchase money from that day until the purchase shall be completed.

If the purchaser shall neglect or fail to comply with the foregoing stipulations on his part, the owner shall be at liberty to rescind the present sale and to resell the premises by auction or private contract; as in his discretion he may deem best and any deficiency in price which may happen on such resale, together with all expenses attending it, shall immediately afterwards be repaid by the present purchaser to the owner, and shall be recoverable as settled and liquidated damages. Witness the hands of the parties hereto.

Form 545.

Agreement for Sale and Purchase of a Dwelling-House.

This agreement, made this ——— day of ———, between ——— of ———, hereinafter called the owner, of the one part, and ——— of ———, hereinafter called the purchaser, of the other part, witnesseth that the said ———, owner, hereby agrees to sell to the purchaser, and the said purchaser agrees to buy, for the sum of ——— dollars, the fee simple in possession, free from all liens and incumbrances, of and in all that dwelling-house, with the stable and other outbuildings and a garden and other land thereto belonging, situate on ——— street, in the town of ———, and state aforesaid, heretofore in the occupation of said owner, all which said premises are delineated on a plan hereto annexed and signed by the parties hereto; together with all the rights, easements, and appurtenances thereto belonging; which said premises are sold and purchased upon and subject to the following terms and stipulations, namely:—

That the purchaser shall pay to the said owner, upon the execution of these presents, a deposit of ——— dollars, on and in

part of his purchase money, and pay him the balance thereof on the ——— day of ——— next, when the purchase shall be completed;

That the purchaser shall take, and on the completion of the purchase pay for, the fixtures and fittings in the said dwelling-house and buildings, and specified in the schedule hereto annexed, at the valuation mentioned therein.

That on payment of the purchase money, and of the value of said fixtures and fittings, the owner shall execute a proper conveyance of the property according to the stipulations herein contained, which conveyance shall be prepared by and at the expense of the owner, and sent to the said purchaser for approval ——— days prior to the said ——— day of ——— next;

That if, from any cause whatever, the purchase shall be delayed beyond the ——— day of ——— next, the purchaser shall thenceforth be entitled to the rents and profits of the property, and shall pay interest at the rate of ——— per cent. per annum on the purchase money till the completion of the purchase;

That if any obstacle or difficulty shall arise in respect to the title, the completion of the purchase, or otherwise, the owner shall be at full liberty, at any time, to abandon this contract on returning the deposit money only to the purchaser;

That if the purchaser shall refuse or neglect to complete his purchase at the time hereby appointed, his deposit money shall be absolutely forfeited as settled and liquidated damages to the owner, who shall be at full liberty, at any time afterwards, to resell the property, either by public auction or private contract; and the deficiency, if any, occasioned thereby, together with all losses, damages, and expenses of and attending the same, shall be borne and paid by the purchaser, but any increase in the price obtained at such sale shall belong to the owner; and it is agreed that time where the same is herein mentioned shall be in all respects of the essence of the contract;

That for the due performance of this contract each party binds himself unto the other in the penal sum of ——— dollars, which shall be recoverable as settled and liquidated damages between them in addition to and irrespective of any other right, liability, and remedy which either of them may have acquired or be subject to by virtue of this agreement. In witness whereof, etc.

Form 546.

Agreement for the Sale of Land without Special Conditions.

Agreement made this ——— day of ———, 19—, between ——— of ———, hereinafter called the owner, of the one part,

and ——— of ———, hereinafter called the purchaser, of the other part.

The owner agrees to sell, and the said purchaser agrees to purchase, for the sum of ——— dollars, whereof ——— dollars shall be paid immediately on the execution of this agreement, and the balance on the ——— day of ——— next at the office of ———, when and where the purchase shall be completed, the fee simple in possession, free from liens and incumbrances, of all that estate situate at ———, bounded and described as follows:—

The owner shall prepare, or cause to be prepared, at his own expense, a proper deed of conveyance (with full covenants of warranty) of the premises to the purchaser, and shall deliver such deed, or cause it to be delivered, to the purchaser or his attorney for examination, not less than ——— days before the said ——— day of ———.

The possession shall be retained by the owner up to the said day fixed for completion of the purchase, when the purchaser shall pay the balance of the purchase money, and the owner shall execute such deed, and thereupon possession shall be delivered immediately to the purchaser.

All taxes, rates, and assessments upon said property not discharged by the owner shall be apportioned between him and the purchaser, as from that day.

If from any cause whatever the purchase shall not be completed on the said ——— day of ———, the purchaser shall pay interest at the rate of ——— per cent. per annum on the unpaid purchase money from that day until the completion of the purchase. In witness, etc.

Form 547.

Same. Another Form.

Agreement made the ——— day of ———, A. D. 19—, between ——— of ———, of the first part, and ——— of ———, of the second part.

The said party of the first part, in consideration of the covenants and stipulations hereinafter mentioned, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with the said party of the second part, his heirs and assigns, that he, the said party of the first part, shall and will, on or before the ——— day of ——— next, at the proper cost and charges of the said party of the first part, his heirs and assigns by a good and sufficient deed of conveyance, free from all liens and incumbrances, grant, convey, and assure unto the said party of the second part, his heirs and assigns, all that parcel of land, etc.,

together with all and singular the buildings and other improvements and appurtenances thereunto belonging.

And the said party of the second part, for himself, his heirs, executors and administrators, doth hereby covenant, promise, and agree with the said party of the first part, his heirs and assigns, that he the said party of the second part shall and will well and truly pay unto the said party of the first part, his heirs and assigns, the sum of ——— dollars upon the execution and delivery of said deed of conveyance. In witness, etc.

Form 548.

Agreement for Sale with Provision against Nuisances.

This indenture, made this ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———, party of the second part, witnesseth:

Said party of the first part, in consideration of the sum of ——— dollars to him in hand paid, and of the covenants, agreements and conditions herein contained, does hereby agree to sell unto said party of the second part all that certain piece of land in the city of ———, county of ———, and state of ———, described as follows: (*description*); and said party of the second part does hereby agree to pay said party of the first part the additional sum of ——— dollars in manner following: (*Terms of payment to be set out*).

Said party of the first part, upon the receipt of such payments in the manner and at the times herein specified, shall execute and deliver to the said party of the second part, or to his assigns, a warranty deed conveying said premises free from all liens and incumbrances; and said deed shall contain a clause or provision against the allowance or permission of nuisances, and also a covenant or agreement against the manufacture or sale of spirituous or other intoxicating liquors, and as to the erection of buildings shall provide that no cottage or other building shall be erected or permitted within ——— feet of the front line of ——— street, premises; and shall further provide that said party of the second part, his heirs, executors, administrators or assigns, shall not at nor within ——— feet of the street line on any other lot in said any time hereafter during his or their ownership erect, make, establish, carry on, permit, cause or suffer to be erected, established or carried on in any manner on the above described premises, any slaughter-house, livery or cow stable, soap factory, foundry, mill, furnace, tanning factory, distillery, brewery, bakery, gunpowder factory, engine-house or other manufactory, trade, business, occupation or calling whatsoever which may be in any

way noxious or offensive to said neighborhood, or which may constitute a nuisance or shall erect, build or commence any building or edifice whatsoever with intent to use the some for any of the purposes above mentioned.

And it is understood that the stipulations herein shall apply to and bind the heirs, executors, administrators and assigns of the respective parties hereto.

In witness, etc.

Form 549.

Agreement for Sale of Growing Timber.

Agreement entered into this ——— day of ———, between ——— of ———, hereinafter called the owner, for himself, his heirs, executors, and administrators, of the one part, and ——— of ———, hereinafter called the purchaser, for himself, his heirs, executors, and administrators, of the other part.

The said owner, in consideration of the sum of ——— dollars, to be paid to him by the said purchaser, and of the agreement, hereinafter contained, on the part of the said purchaser, doth by these presents agree to sell unto the said purchaser all the timber and other trees standing, growing, and being on a certain tract of land bounded and described as follows, namely, etc.; together with the boughs, tops, and the bark thereof; with full and free liberty of entry and right of way for the said purchaser, his servants, agents, workmen, and teams in, through, over, and upon the said premises, for the purpose of felling, cutting down, and carrying away the said trees, boughs, tops, and the bark thereof; and also to place and dry the bark of the said trees on any convenient part of the said premises.

In consideration of the premises the said purchaser doth, by these presents, agree to pay unto the said owner, his executors, administrators, or assigns, the sum of ——— dollars, without deduction, in manner following:

And also that he, the said purchaser, his executors, administrators, or assigns, will fell, cut down, and carry away the said trees, with the boughs, tops, and the bark thereof, before the ——— day of ——— next; and in so doing, will do or cause to be done as little injury or damage as possible to the grass, crops, and other property of the said owner, his heirs, or assigns; and will also make compensation to the said owner, his heirs, or assigns, for all injury or damage so done.

Sale of Timber. Another Form.

Agreement made the ——— day of ———, between ———, hereinafter called the owner, and ———, hereinafter called the purchaser.

The owner will sell and the purchaser will buy the timber and trees growing on a certain lot of land situate at the northeasterly corner of the owner's farm in the town of ———, in ——— county, said lot containing about ——— acres, and being the same land pointed out by the owner to the purchaser. The purchase price of the timber and trees it is agreed is ——— dollars, of which one-half part shall be paid on the signing of this agreement, and the balance on the ——— day of ———.

Such trees shall be felled with all possible care to avoid injury to fences and to the undergrowth of trees not cut by the purchaser. The purchaser shall make proper compensation to the owner for all damage the owner may sustain by the carelessness or negligence of the purchaser's workmen.

Form 550.

Agreement for Sale of Timber and Trees. Another Form.

This agreement made this ——— day of ———, 19— between — of ———, hereinafter called the owner, of the one part, and ——— of ———, hereinafter called the purchaser, of the other part, witnesseth:—

The said owner agrees to sell, and the said purchaser agrees to purchase, for the sum of ——— dollars, on which a deposit of ——— dollars has now been paid, all the timber and trees now standing and growing on a certain parcel of land situate in ———, in the said ———, county of ———, and belonging to the said vendor.

The said owner hereby grants unto the said purchaser and his assigns the full and free license and authority to enter into and upon said land with his or their servants, agents, and workmen, and cut down said timber and trees, and such underwood as may impede the cutting and felling and removal thereof; and to remove the whole of said timber and trees, when and as he the said purchaser, or his assigns, shall deem fit and proper, but within the time hereinafter limited; but doing no unnecessary damage to the underwood or crops, and repairing the fences wherever injured or taken down.

And the said purchaser further agrees to cut and remove said trees on or before the ——— day of ——— next, and to repair all

such damages as may necessarily be occasioned to the roads and fences.

And it is hereby mutually agreed that the said purchase shall be completed on or before the ——— day of ——— next, when the residue of the purchase money shall be paid; and in this respect time shall be of the essence of the contract; but if the said owner should die on or before said last mentioned date, the said purchaser shall, if he be thereby deprived of any right hereby conferred, be entitled to a proper compensation in respect thereof, and any question or difference relating to the amount thereof, as well as any compensation to be made by said purchaser touching any damage or other matter arising under this contract, shall be referred to and shall be finally determined by two impartial persons, one to be selected by each of the said parties, and if the two persons thus selected shall not agree, then an umpire shall be chosen between them, whose decision shall bind both parties, and in case either of said parties shall fail or neglect to appoint a referee within ——— days after a written request therefor shall be made by the other party, then the referee appointed by such other party may proceed alone, and his award shall be binding on both parties. In witness, etc.

Form 551.

License to Lay Pipes Across Land.

In consideration of ——— dollars, the receipt whereof I do acknowledge, I, ——— of ———, do hereby give and grant to the ——— company, its successors and assigns the right to lay, maintain, operate, repair and remove the following pipes, etc., through and over the following described land to wit: (*Describe property.*)

The said pipes shall be laid according to the following course (*insert description*), and shall be dug down at least ——— feet. It is understood and agreed, that all damages to crops, fences and the like caused by laying, operating or removing the same shall be paid by said company. In witness, etc.

Form 552.

Agreement with Real Estate Agent to Sell Property.

This agreement, made this ——— day of ———, 19—, between ——— of ———, hereinafter called owner, and ——— of ———, hereinafter called the agent, witnesseth:

That said owner has this day placed with said real estate agent,

for sale, the following described real estate of which said principal is the owner in fee simple, located in ———, county of ———, state of ———, and more particularly described as follows: (*Insert description.*)

Said real estate agent shall be authorized and empowered to sell said property for a period of ——— months from date, at the stipulated price of ——— dollars. If said real estate agent shall sell said property for said price, or some lower price which said principal may authorize him to accept, then said real estate agent shall receive a commission of ——— per cent. on the amount of said sale. If said real estate agent shall sell said property for more than the price above named, said principal hereby agrees to divide such excess, half and half, with said real estate agent in addition to his commission. Said agent undertakes to exercise due diligence in trying to find a purchaser for said property on said terms.

In witness, etc.

Form 553.

Same. Another Form.

.....1910.

I hereby appoint and employ the A. B. Company as my sole agents to sell for me the following described property, situated in the county of ———, state of ———: ——— for the sum of $——— on terms as follows: ———: ———

I agree to furnish an abstract or certificate of Title, showing good title to said property, and to execute and deliver the usual Grant Deed conveying said premises to the purchaser thereof, free and clear from all incumbrances.

I agree to pay to the said A. B. Company, as commission for making the said sale, the sum of ——— per cent. of the purchase price. I further agree that this contract shall remain in force for ——— months.

If I sell to anyone, within thirty days after the expiration of this contract, to whom said property has been recommended by said A. B. Company during the time this contract was in force I agree to pay it the said commission of ——— per cent. on the amount for which the same shall be sold.

Form 554.

Agreement between Adjoining Landowners Relating to the Continuance of an Encroachment.

This agreement made this ——— day of ———, 19—, between ——— of ———, party of the first part, and ——— of ———,

party of the second part. Witnesseth: Whereas the said party of the first part is the owner of a building situate in the city of ———, and the said party of the second part is the owner of a lot of land adjoining the same on the west side thereof; and whereas by mistake a portion of the west wall of said building belonging to said party of the first part encroaches on the land of the said party of the second part and it is mutually desired that such fact shall not create a right or easement; it is therefore now mutually agreed between the parties hereto that:

The said encroachment of the said west wall of the building belonging to the party of the first part shall be deemed to have been made, and the continuance of the same hereafter shall be deemed to be, with the express license and consent of the said party of the second part, so that the said party of the first part shall not acquire any easement or right in respect to the same.

The said party of the first part shall pull down and remove the said wall so far as the same encroaches upon the land of the said party of the second part within ——— months after the said party of the second part shall have given to the said party of the first part, or to the owner or occupant for the time being of the said house, a notice in writing requiring him so to do and it is agreed that every such notice shall be sufficient if left at the said house, although not addressed to any person by name or description.

The respective owners for the time being of the said lots of land shall have the benefit of and be bound by the terms of this agreement, and shall be deemed to be included wherever the names of the said parties hereto respectively occur. In witness whereof, the parties hereunto set their hands and seals the day and year first hereinabove mentioned.

Form 555.

Agreement between Riparian Owners as to the Erection of a Dam and Regulation of the Flow of Water.

Agreement made the ——— day of ——— between A. B., of the first part, and C. D. of the second part.

Whereas the said A. B. is seized in fee simple of a piece of land situate at ——— in the county of ——— through which flows a stream, and C. D. is seized in fee simple of land next adjoining the land of A. B., but lying farther up the stream, and the said C. D. has erected a dam on his land which causes the flaw of the stream at certain times to become materially diminished, and as a result disputes have arisen between said parties.

Now it is hereby agreed that the said dam shall be deemed to have been erected and shall remain with the express license and

consent of the said A. B. so that neither the said C. D. nor any person claiming under him shall obtain and acquire any easement therein or said stream by prescription or otherwise.

The said C. D. shall immediately erect in his said dam a proper floodgate (*describing it by dimensions, etc.*) so that in dry weather by opening said floodgate the water kept back by said dam may be admitted into the stream so as to flow through the land of said A. B., who shall have the full right and privilege of regulating the flow of water by means of said floodgate, and for that purpose shall have the full right and liberty of entering upon the land of the said C. D. by him or his tenants and agents and of doing all things reasonably necessary to regulate the flow of such water.

In witness, etc.

Form 556.

Agreement between Man and Woman Contemplating Marriage That Neither Shall Obtain any Interest in the Estate of the Other.

This indenture, etc.

Whereas the said parties intend shortly to intermarry and in consideration thereof each of said parties has agreed with the other that neither of them shall acquire any estate, right, title or interest in any property real or personal, or right of action, of which the other of them has or shall have at the time of said marriage; and that said ——— (*intended husband*) shall have no right, interest or claim in the estate of ——— (*intended wife*), real or personal, after her decease, as tenant by curtesy or administrator, or by virtue of any statute of distribution; and that ——— (*intended wife*) shall have no right to dower or homestead in any real estate of which ——— (*intended husband*) is or shall be seized or possessed, and no claim to his personal estate by virtue of any statute of distribution. Now know ye, that in consideration of premises and of covenants and agreements acknowledged and recorded of said ——— (*intended husband*), hereinafter contained on his part and of $1 to her, ———, said (*intended wife*), paid by said ——— (*intended husband*), she, said ——— (*intended wife*), does hereby assent to and accept and covenant and agree to and with said ——— (*intended husband*), his heirs, executors, administrators, and assigns, to accept the covenants and agreements aforesaid to and for his own benefit in lieu, bargain and satisfaction of and for all homestead, dower and thirds at the common law, or by force of any statute, custom or otherwise which she, said ——— (*intended wife*), could or might under any circumstances whatever otherwise have claimed

or have been entitled to or out of all or any of the messuages, lands, tenements and hereditaments whatsoever of which he, said ——— (*intended husband*), now is or may during said coverture be seized for any estate or inheritance, or for other dowable estate or interest whatsoever. And she, the said ——— (*intended wife*), does acquit, release and discharge said lands and premises and all and singular the personal estate which the said ——— (*intended husband*) shall be possessed of or entitled to at his decease, of and from all claims of dower, homestead or as an heir-at-law, or under and by force of any statute, custom or otherwise, so that the same and any part thereof shall, in case she, said ——— (*intended wife*), shall survive said—(*intended husband*), go and be disposed of in like manner in every respect as if he, said ——— (*intended husband*), had continued sole and unmarried. And said — (*intended husband*), in consideration of premises and of covenants and agreements of said ——— (*intended wife*), herein contained, and of her release aforesaid and of $1 to him paid by said ——— (*intended wife*), recorded, acknowledged, he, said ——— (*intended husband*), does promise, declare and agree to and with said ——— (*intended wife*), and her heirs, executors, administrators, that she, said ——— (*intended wife*), from and after said intended marriage has been solemnized, shall hold, possess and enjoy during coverture to her sole and separate free from all dominion, control or interference of him, the said ——— (*intended husband*), all and single the real and personal estate which she may own, possess or be interested in at the time of marriage or at any time afterwards.

And that she said ——— (*intended wife*) shall have the full and complete disposition of all and singular her estate, both real and personal, including all choses in action, by her last will and testament, in the same manner and to the same extent as if she had remained sole and unmarried. And in the event of the death of said ——— (*intended wife*) during the lifetime of said ——— (*intended husband*) he shall not and will not have any right, claim or demand on or in the estate, right, title or interest in or to any or all of the real and personal estate whatever of said ——— (*intended wife*) as tenant by the curtesy, or as administrator or by force of any statute of distribution or otherwise, and he, the said (*intended husband*) does discharge, release and acquit all and singular the real and personal estate and choses in action which said ——— (*intended wife*) shall possess or be entitled to at her death of, and from all claim as tenant by the curtesy, or by virtue of any statute of distribution or any other statute whatsoever; and the same is hereby declared to be discharged forever from any and all such claims or demands.

In witness whereof, etc.

Form 557.

Sale, Part of the Purchase Money to be paid by Mortgagee.

This agreement made the ——— day of ———, A. D. 19—, by and between A. B. of ———, hereinafter called the owner, and C. D. of ———, hereinafter called the purchaser, witnesseth:

The said owner hereby agrees to sell and convey to the said purchaser the messuage or tenement and lot or piece of ground thereunto belonging, situate, etc., for the sum or consideration of ——— dollars, to be paid by the said purchaser in way and manner as follows: namely: ——— dollars to be paid by the purchaser's note, payable in ——— years from the date hereinafter mentioned, with interest, payable semi-annually at the rate of ——— per cent. per annum, secured by a mortgage of said premises, made in the usual form, with power of sale; and ——— dollars, being the remainder of said consideration, to be paid upon the delivery to said purchaser of a full and satisfactory deed of conveyance for the said premises, free from all incumbrances, possession thereof, on or before the ——— day of ——— next.

And the said purchaser in consideration of the premises hereby agrees to purchase the above described premises from the said owner for the sum above mentioned, and to pay and settle for the same in the way and manner and at the time above set out. The conditions of this agreement shall extend to and bind the heirs, executors, administrators, and assigns of each of the contracting parties. In witness, etc.

Form 558.

Another Form of Similar Agreement.

This agreement made and entered into this ——— day of ———, A. D. 19—, between A. B. of ———, in the county of ———, and state of ———, party of the first part, and C. D. of ———, in the county of ———, and state of ———, party of the second part, witnesseth:

The said party of the first part, in consideration of the covenants and agreements hereinafter contained, to be done and performed on the part of the party of the second part, doth hereby covenant and agree to and with the said party of the second part to sell and convey to him in fee simple, by a good and sufficient deed of conveyance, with covenants of warranty, free and clear from all liens, rights of dower, or other incumbrances (unless hereinafter specified), all that piece or parcel of land situate in

the ———, county of ———, and state of ———, described as, etc.

The party of the second part covenants and agrees to purchase of the said party of the first part the premises above described, and to pay and secure to be paid therefor the sum of ——— dollars, in the manner following: the sum of ——— dollars is to be paid in cash upon the execution of such deed, and the remainder of the purchase money, being the sum of ——— dollars, is to be secured by the note and mortgage of said party of the second part as hereinafter more particularly described.

On the payment of the sums to be so paid on or before the ——— day of ———, 191—, the party of the first part covenants that he will on that day deliver to the party of the second part the deed aforesaid; and concurrent therewith, the party of the second part covenants and agrees that he will secure to the party of the first part the balance of the purchase money aforesaid by executing and delivering his note therefor, with a mortgage upon said premises duly acknowledged, which note and mortgage shall be conditioned to pay the sum of ——— dollars in ——— years from the ——— day of ———, with interest payable semi-annually, and to be computed from the said last named date at the rate of ——— per cent. per annum.

The said deed and note and mortgage shall be delivered and the money paid at the office of ———, in the city of ———.

The party of the first part covenants and agrees that on the ——— day of ———, 19—, and upon the performance by the party of the second part of the covenants herein contained on his part to be done and performed, he will deliver to the party of the second part quiet and peaceable possession of said premises, in as good condition as they now are, natural wear excepted.

The party of the second part agrees to pay all taxes and assessments that shall be paid, levied or assessed on said premises during the time he shall have possession under this agreement.

It is further covenanted and agreed that in case the party of the second part should have possession of said premises before the execution and delivery of said deed, and in case he should fail to perform any of the covenants herein contained, he will yield and deliver to the party of the first part quiet and peaceable possession of said premises; that the party of the first part may immediately after such failure re-enter and take possession of the same, without any previous notice to quit in reference to any legal proceedings to recover possession thereof.

It is mutually covenanted and agreed that, in case either party fails to perform the covenants herein agreed to be performed by such party, the party so failing shall and will pay to the other the

sum of ——— dollars, which sum is hereby fixed and agreed upon as the settled and liquidated damages for such failure and breach of contract, and that the same shall in no event be considered a penalty. In witness, etc.

Form 559.

Agreement Allowing Purchaser to Retain Part of Consideration Until Removal of Defect in Title.

This agreement made this ——— day of ———, between ——— of ———, hereinafter called the owner, and ——— of ———, hereinafter called the purchaser, witnesseth:

Whereas by a contract bearing date the ——— day of ——— last, the said owner agreed to sell and the said purchaser agreed to purchase, for the sum of ——— dollars, the tract of land in said contract described; and whereas in the course of examining the title it is ascertained that there is an undischarged mortgage upon the said premises, and that there is a controversy as to the amount due upon said mortgage so that it cannot be discharged at once, but the said purchaser has agreed to complete the said purchase immediately, on being allowed to withhold the sum of ——— dollars out of the purchase money until the discharge of said mortgage.

Now, in pursuance of such arrangement, he, the said purchaser, hereby agrees to pay the residue of the said purchase money, and to complete the said purchase, whenever the said owner shall cause said mortgage to be discharged, and until such time to pay interest on the said sum withheld out of the purchase money at the rate of ——— per cent. per annum.

And it is hereby mutually agreed that in case the said owner shall be unable or shall fail to procure a discharge of said mortgage within ——— calendar months from the date of this agreement the said sum of ——— dollars so withheld out of said purchase money shall belong to the said purchaser, who shall be at liberty to retain the same to apply to the payment of said mortgage so far as required and as settled liquidated damages in respect of the said defect of title; and thereupon the said purchaser shall be no longer liable to pay or account for said sum, but shall be absolutely discharged therefrom; and the said owner shall be released and discharged from all obligation to procure a discharge of said mortgage. In witness, etc.

Form 560.

Agreement by Owner for Delivering Possession to Purchaser before Transfer of Title.

This agreement made this ——— day of ———, 19—, between ——— of ———, hereinafter called the owner, and ——— of ———, hereinafter called the purchaser, witnesseth:

Whereas by a contract in writing between the said parties bearing date the ——— day of ———, the said owner agreed to sell, and the said purchaser agreed to purchase, a certain piece or tract of land with buildings in said contract described; and whereas it is probable that some delay will occur in completing such sale, the said purchaser is desirous of taking immediate possession of the premises: Now, the said owner hereby agrees that he will on the ——— day of ——— instant deliver up to the said purchaser the full possession of the said premises as if the conveyance thereof had been executed; that the said purchaser shall be at full liberty to make, in a proper and substantial manner, all such alterations in and additions to the said buildings as he shall require, but subject in all respects, to the approbation of the said owner, and they shall be made in such a manner that the value of the premises shall not be impaired. It is hereby mutually agreed that such taking of possession shall not be deemed or treated as waiving the contract of sale, or in any manner as affecting the rights of the parties under it; that such taking of possession shall not be deemed or treated as an acceptance of the title to said premises; but that the same shall be considered as taken conditionally upon, and without prejudice to, the due performance of the said contract and every term and condition thereof. In witness, etc.

Form 561.

Agreement for Sale of House Under Lease.

This agreement made the ——— day of ———, between ———, hereinafter called the owner, and ———, hereinafter called the purchaser, witnesseth:

The owner will sell and the purchaser will buy at the price of ——— dollars, of which the sum of ——— dollars by way of deposit is now paid, the receipt of which the owner hereby acknowledges the leasehold premises at No. ——— ——— street, in the city of ———, for the unexpired residue of a term of ——— years from the ——— day of ———, granted by a lease dated the ——— day of ———, now vested in the owner subject

to the yearly rent of ——— dollars reserved by said lease; it is expressly understood and agreed that the said lease has been examined by the purchaser who shall be deemed to buy with full notice of all the provisions thereof.

The purchaser shall accept the production of the last receipt for the reserved rent as conclusive evidence that nothing has been done or omitted down to the date hereof, by which the said lease is liable to forfeiture.

The purchase shall be completed and the balance of the purchase money paid at the owner's office on the ——— day of ———, whereupon the purchaser shall have a proper conveyance of the leasehold premises from the owner and shall be let into possession, and if from any cause the purchase money shall not be paid on that day the purchaser shall pay the interest thereon till the day of actual payment.

The owner shall obtain immediately consents that may be necessary to the assignment to the purchaser.

In witness, etc.

Form 562.

Agreement for the Conditional Sale of Real Estate.

This agreement, made this ——— day of ———, 19—, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part, witnesseth:

The party of the first part does hereby demise and lease unto said party of the second part the following described premises situated in the county of ———, state of ———, to wit: (*description of property*) with all the rights, privileges and appurtenances thereunto belonging, to have and to hold the same for the period of ——— years from the date hereinabove mentioned.

In consideration of said demise and lease, said party of the second part hereby agrees to pay as rent for said premises, in lawful money of the United States, without relief from valuation and appraisement laws, as follows, to wit: the sum of ——— dollars, cash in hand, at the execution of this instrument, and the sum of ——— dollars per month on the ——— day of each and every month thereafter, to and including the ——— day of ———, 19—, and attorney's fees. Also in addition to the foregoing sums to pay as rent all taxes and assessments including the taxes for the current year, which may from time to time be levied or assessed made against said premises by the state of ———, or by any municipal authority under the laws of said state, at or before the time whereon they shall be payable, so that no penalties on account of the non-payment of the same may be imposed.

Also at all times to keep the said property insured against loss or damage from fire in some reliable insurance company to be approved by said party of the first part in the sum of ——— dollars, loss payable to the party of the first part as his interest may appear, policies for which insurance shall be delivered to the party of the first part.

In the event that the party of the second part shall at any time fail to pay said instalments of rent at the times in this agreement provided, or shall at any time fail to pay such taxes or assessments when due and payable, or to provide and maintain such insurance, then and in either such event, the party of the first part may at his option either pay such taxes or assessments or provide such an insurance, in which case the amount so paid by the party of the first part, together with interest thereon at the rate of ——— per cent per annum from the date of such payment, shall be payable upon demand as part of the rent reserved; or in the event of the failure of said party of the second part to make such payments or any of them at the times and in the manner above provided, the party of the first part shall have the right to declare this lease terminated and to re-enter and take possession of said demised premises and expel said party of the second part therefrom without in any manner being a trespasser in so doing, and the failure of the said party of the first part at any time or times thus to re-enter and take such possession, shall not be construed as a waiver of his right, or to estop him at any time thereafter from so doing, should the cause for a forfeiture then continue, should there be a recurrence thereof.

Said demised premises shall be used and occupied as (purposes to be named) and for no other purpose whatsoever; and said party of the second part shall exercise reasonable care in the preservation of said demised premises.

At the expiration of this lease, occurring either by the expiration of the full term thereof or by reason of the forfeiture by the party of the second part, under the stipulations therein contained, said party of the second part shall surrender to said party of the first part said premises peaceably and in good order, natural wear and tear and the act of God excepted; and by the occupation of said premises thereafter the party of the second part shall acquire no rights as a tenant.

It is further agreed as a consideration of this lease that the party of the first part does hereby give and grant unto the said party of the second part, at, or at any time prior to the termination of this lease by lapse of time or forfeiture thereof, the right and option to purchase said demised premises upon the following terms, to wit: To pay to said party of the first part such sum as added to the payments theretofore made, less such payments as

shall have been made for taxes, assessments and insurance, whether made by the party of the first part or by the party of the second part, and if paid by the party of the first part with interest thereon at ——— per cent., as equals the sum of ——— dollars, together with such additional sum as would equal interest at the rate of ——— per cent. per annum upon the monthly payments, from the date hereof, until the same shall have been paid. When such payments have thus been made, the party of the first part shall execute and deliver to said party of the second part his warranty deed for said premises, upon the payment to him by said party of the second part, in cash, the further sum of ——— dollars: provided, that the said party of the second part shall have the right to divide said last sum into three equal annual payments, and to secure the payment thereof by his promissory notes therefor, due respectively on or before one, two, three years from said date; said notes to be negotiable and payable to the order of the party of the first part at some bank in the city of ———, to bear interest at the rate of ——— per cent. per annum and to provide for the payment of attorney's fees, and to be payable without relief from valuation or appraisement laws; and said notes shall be secured by mortgage upon said demised premises.

It is expressly understood and agreed that unless and until the party of the second part shall exercise the option hereby granted him to purchase said demised premises, and shall have made the payments and executed the note and mortgage requisite to the exercise of such option, his only estate in said premises shall be that of tenant thereof. And it is further agreed that said party of the second part shall not sub-let said premises nor assign this lease and condition to purchase without consent in writing of the party of the first part, first had and obtained and indorsed hereon.

In witness, etc.

Form 563.

Agreement for Sale of Building Lot with Option to Purchase Adjoining Lots.

This agreement made the ——— day of ——— between ———, hereinafter called the owner, and ———, hereinafter called the purchaser, witnesseth:

The owner hereby agrees to sell and the purchaser hereby agrees to buy in fee simple and unincumbered all that parcel of land numbered ——— on the plan hereto annexed for price of ——— per square foot, to be paid upon the tender of a good and sufficient deed.

In consideration of the agreement to purchase hereinbefore contained, the purchaser shall have the option at any time during a period of ——— months from the date hereof, of purchasing all or any of the lots delineated on said plan in addition to the lot now agreed to be purchased at the price of ——— per square foot.

Such option shall be exercised by the purchaser giving to the owner one calendar month's notice in writing of his intention to purchase and specifying the lot or lots to be purchased, and such purchase shall be completed at the office of A. B. the attorney for the owner, upon the payment by the purchaser to the owner of the price for each lot of ——— per square foot: Provided always, that if the purchaser, having given notice as aforesaid of exercising the said option, shall fail to complete the purchase comprised in such notice in accordance with this agreement, he shall not be entitled at any subsequent time to exercise such option in respect of the same premises, and the option shall thereupon cease and terminate without prejudice to any rights which the owner may have against the purchaser caused by such default. It is expressly agreed that for all purposes connected with the exercise of the option hereby given, time shall be deemed to be of the essence of the contract.

The property is sold and will be conveyed subject to the restrictions and stipulations contained in the schedule hereto annexed for the benefit of the owner's adjoining land, and the deed to the purchaser shall contain such provisions and covenants as the owner may reasonably require, for the purpose of effectuating and enforcing the said restrictions and stipulations.

In witness, etc.

Form 564.

Agreement for an Exchange of Parcels of Land.

This agrement made this ——— day of ———, 19— between A. B. of ———, of the first part, and C. D. of ———, of the second part, witnesseth:

Whereas the said party of the first part is the owner in fee simple of a certain parcel of land with the buildings thereon, situate in ——— aforesaid, bounded and described as follows, namely, etc.; and whereas the said party of the second part is the ower in fee simple of certain parcels of land situate in said ———, bounded and described as follows, namely, etc., and whereas the said parties have agreed to make an exchange by way of mutual sale and conveyance of their said respective properties, now it is agreed as follows:—

That the said party of the first part shall, in consideration of

the property hereby agreed to be conveyed by the said party of the second part to the said party of the first part, and of the sum of money to be paid by the said party of the second part to the said party of the first part, as hereinafter mentioned, sell and convey to the said party of the second part the said described land of said party of the first part, with the buildings thereon, and the appurtenances thereof, in fee simple in possession, free from all liens and incumbrances.

That the said party of the second part shall, in consideration of the property hereby agreed to be conveyed by the said party of the first part to the said party of the second part, sell and convey to the said party of the first part the said described land of said party of the second part, with the appurtenances thereof, in fee simple and possession, free from all liens and incumbrances, and shall pay to the said party of the first part the sum of money hereinafter mentioned.

The said property belonging to the said party of the first part is considered as being of greater value than the said premises belonging to said party of the second part, by the sum of ——— dollars, and, therefore, the said party of the second part shall, upon the execution of said deeds, pay to the said party of the first part the sum of ——— dollars, the difference as aforesaid in value of the said premises.

The said exchange shall be completed on the ——— day of ———, at the office of ———, at ———, when each of said parties shall, by good and proper deeds, convey the said premises belonging to him unto the other of them, free from all liens and incumbrances.

Each of said parties shall be entitled to the possession and to the receipt of the rents and profits of the premises hereby agreed to be conveyed to him from the ——— day of ———.

If from any cause whatever the said respective conveyances shall not be completed on or before the said ——— day of ——— next, interest at the rate of ——— per cent. per annum upon the sum to be paid for equality of value, as aforesaid, shall be paid by the said party of the second part from the said ——— day of ——— next, until the completion of said conveyances. In witness, etc.

Form 565.

Same. Another Form.

This agreement made this ——— day of ———, 19—, between ——— of ———, of the first part, and ——— of ———, of the second part, witnesseth:

The said party of the first part shall give, and the said party

of the second part shall take, the fee simple in possession of all that parcel of land, etc., with the appurtenances, free from liens and incumbrances, in exchange for the hereditaments hereinafter agreed to be given by the said party of the second part; and the said party of the second part shall give, and the said party of the first part shall take, all that parcel, etc., with the appurtenances, free from liens and incumbrances, in exchange for the hereditaments hereinbefore agreed to be given by the said party of the first part.

Each party shall, within ——— days from the date of this agreement, deliver to the other of them or to his attorney an unexecuted deed of the premises to be conveyed by him, or will furnish him with an abstractor other sufficient information to enable him to examine the title to said premises.

The said exchange shall be completed on the ——— day of ——— next, by proper deeds to be respectively prepared by, and at the expense of, the party by whom they are to be made.

Each party shall, on completion of the exchange, be let into the possession of the premises agreed to be taken in exchange by him, on or as from the said ——— day of ———, and on or as from that day all taxes, rates, and other charges or incumbrances shall be discharged by the other party. In witness, etc.

Form 566.

Agreement for the Sale of Building Lots, the Owner to make Advances.

This agreement this ——— day of ———, 19—, between ——— of ———, hereinafter called the owner, of the one part, and ——— of ———, hereinafter called the purchaser of the other part, witnesseth:

The owner agrees to sell, and the purchaser agrees to purchase, for the sum of ——— dollars, being at the rate of ——— dollars for each square foot of land comprised in the parcel hereinafter described, all that piece of land situate, etc., containing ——— square feet, and delineated in the plan hereto annexed, and therein colored blue, with the appurtenances, in fee simple in possession, free from all incumbrances, with the right of using and enjoying the streets adjoining the same, and the common passageway shown in said plan, and all outlets thereof, in common with all other persons entitled to use and enjoy the same.

The purchase money shall be paid by the purchaser to the owner on or before the ——— day of ———, 19—, at the office numbered ——— on ——— street, or elsewhere, as the owner may direct; and instalments of such purchase money may be paid at

any time, and the owner shall convey to the purchaser at any time the lot of land upon which any house shall have been built in the manner hereinafter provided upon the payment of the above named stipulated price of such land, and all advances made by the owner in respect of the house built upon the same. The purchaser shall pay to the owner interest at the rate of ——— per centum per annum on said purchase money from the ——— day of ——— and interest at the same rate on all advances made by the owner to the purchaser as herein contemplated, until the said purchase shall be completed.

The purchaser shall be entitled to the immediate possession of the said piece of land, and shall bear and pay all taxes, rates, and assessments in respect to the same extent as if the said piece of land had been conveyed to him.

The purchaser shall not dig for or remove from said piece of land or any part thereof any gravel, sand, clay, or other substance, beyond the necessary excavations for the buildings to be erected thereon, without previous consent in writing of the owner.

The purchaser shall, within one calendar month after the execution of these presents, commence, and without intermission and with reasonable expedition proceed with the erection of, ——— houses on the said piece of land, and shall completely finish, fit for habitation, the said houses on or before the ——— day of ———, which said houses shall front upon ——— street aforesaid, and shall be erected in a proper, workmanlike manner, in accordance with plans and elevations, to be first approved of in writing by the owner's architect, and shall be built of good materials, and the said houses shall be set back ——— feet from said ——— street.

If the purchaser shall in all respects observe and perform his part of the agreement, the owner will advance to him, for the purpose of assisting him in the erection of the said houses, the sum of ——— dollars in respect of each house at the times and in the sums following, namely: ———. But it is hereby agreed that the owner shall not be obligated to make any advance in respect of any house unless such house, exclusive of the value of the land, shall be equal in value to double the amount of the sums, if any, then advanced thereon, and of the sum or sums so required to be advanced, and the application for each advance must be made not less than ——— days before the same is payable.

The purchaser shall, at his own expense, insure the buildings to be erected on said land, and any building materials for the time being thereon, for the benefit and security of the owner, in a sum or sums equal in amount to any advances made in compliance with the terms of this agreement.

The owner shall have a lien or charge upon said land, and upon all the buildings for the time being erected or in course of erection thereon, and upon all the building materials and other things which shall for the time being be brought upon the said land, or the streets and passage-ways adjoining the same, as well for the said purchase money and the interest thereon as also for such sums of money as the owner may have advanced or paid as herein provided.

When and as soon as the purchaser shall have paid to the owner the purchase money of said land or any house-lot of the same, together with all sums of money advanced or paid by the owner in respect to any building or buildings thereon in compliance with the terms of this agreement, the owner shall execute a proper deed of said land or house-lot, and such deed shall contain covenants on the part of the purchaser, his heirs, executors, administrators, and assigns, with the owner, his heirs and assigns, that no building which shall be erected upon said piece of land shall be used for the purpose of carrying on any trade, business, or manufacture, or for any purpose which may be or become a nuisance or annoyance to the neighborhood, and that an area of the depth of ——— feet from ——— street aforesaid shall at all times hereafter be left open and unbuilt upon, except that bay windows may project over the same, not more than ——— feet from the house to which they belong; and also that the purchaser, his heirs or assigns, will from time to time pay one-half of the expense of keeping in repair so much of the said passage-way as is coextensive with the said piece or lot of land.

The purchaser shall be entitled to have said piece of land conveyed to him by several deeds, not exceeding the number of house-lots into which said land may be divided, upon payment to the owner on account of said purchase money of the sum of ——— for each superficial square foot of land to be comprised in such deed with interest thereon as aforesaid, and the advances made by the owner in respect of the buildings erected on the land to be comprised in such deed with interest as aforesaid, and all sums paid for insurance and the interest due in respect thereof, provided that the purchaser shall not at any time require a conveyance of part of the said land under this clause, unless at the time of such conveyance he shall have proceeded with the erection of at least ——— houses on the land remaining, and shall have complied in all respects with the provisions herein contained.

Should default be made by the purchaser in the observance and performance of his part of this agreement in any respect, and time shall be deemed to be of the essence of the contract, or if the purchaser shall become bankrupt or make any composition

with, or any assignment for, the benefit of his creditors, then and in such case the owner may re-enter upon such land, or any part thereof not previously conveyed to the purchaser, and by notice in writing to be delivered to the purchaser, or left for him at his usual and last known place of abode, absolutely terminate and nullify this agreement so far as relate to such portion of said land as may not previously have been conveyed to the purchaser.

If this present agreement shall be terminated by the owner as hereinabove provided, so much of the said land as shall not have been conveyed to the purchaser pursuant to this agreement, together with the buildings thereon, and all building materials which, under the previous clauses of this agreement, are provided to be attached and belong to the said land or the buildings thereon, shall immediately after the delivery of the notice to terminate this agreement, be and remain the absolute property of the owner, freed and discharged from all claims and demands of the purchaser in respect thereof or otherwise on account of this agreement, and the purchaser shall thenceforth be freed and discharged from all obligations created by this agreement, and which then remain unperformed. In witness, etc.

Form 567.

Agreement for Purchase subject to a Mortgage to be Assumed by Purchaser.

This agreement made this ——— day of ———, A. D. 19—, between A. B. of ———, in the county of ———, and state of ———, of the first part, and C. D. of ———, in the county of ———, and state of ———, of the second part, witnesseth:

The party of the first part hereby agrees to sell, and the party of the second part agrees to purchase, that certain property described as follows:

Said premises are to be conveyed within ——— days from this date by a good and sufficient warranty deed of the party of the first part, conveying a good and clear title to the same free from all liens and incumbrances, excepting a mortgage thereof made by said party of the first part to ——— of ———, for the sum of ——— dollars, dated the day of ———, and recorded in ———, book, ———, page ———, which said mortgage, and the interest thereon to the date of the deed hereby contracted to be made, the said party of the second part is to assume and pay as part of the purchase money of said premises.

For such deed and conveyance the party of the second part is to pay the further sum of ——— dollars, of which ——— dollars have been paid this day, ——— dollars are to be paid in cash

upon the delivery of said deed, and the remainder is to be paid by the note of the party of the second part, dated the ——— day of ——— next, bearing interest at ——— per cent. per annum, payable semi-annually, and secured by a power of sale mortgage in the usual form upon the said premises, such note to be payable to the order of the said party of the first part in ——— years from the date thereof.

Full possession of the said premises, free of all tenants (subject to a lease of the same, made by the said party of the first part to ——— for the term of ——— years from ———), is to be delivered to the party of the second part at the time of the delivery of the deed, the said premises to be then in the same condition in which they now are, reasonable use and wear of the buildings thereon only excepted.

In witness whereof the said parties hereto, and to another instrument of like tenor, set their hands and sels on the day and year first above written.

Form 568.

Agreement for Purchase of Land, Purchase Money to be Paid in by Instalments, the Purchaser becoming the Vendor's Tenant.

This agreement made this ——— day of ———, A. D. 19—, between A. B. of ———, party of the first part, and C. D. of ———, party of the second part, witnesseth:

The said party of the first part, in consideration of the sum of ——— dollars to him duly paid, hereby agrees to sell unto the said party of the second part all that, etc., for the sum of ——— dollars, which the said party of the second part hereby agrees to pay the party of the first part as follows: the sum of ——— dollars on the ——— day of ——— next; the sum of ——— dollars on the ——— day of ———, etc., with interest on each instalment from the date of these presents at the rate of ——— per cent. per annum, until the same is paid.

Said party of the second part also agrees to pay all taxes and assessments that shall be taxed, levied or assessed on or against said premises from the date hereof until the said sum shall be fully paid as aforesaid.

And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall at his own proper cost and expense execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed of said premises with full covenants of warranty.

It is mutually agreed between said parties that the said party of the second part shall have possession of said premises on the

——— day of ———, 19—, and shall keep the same in as good condition as they are in at the date hereof, until the said sum shall be paid as aforesaid.

Until the completion of the purchase on or before the ——— day of ———, the said party of the second part shall hold the said premises as tenant to the owner at the yearly rent of ——— dollars, payable semi-annually on the ——— day of ——— and the ——— day of ——— in each year, the first of such payments to be made on the ——— day of ———. In case the rent paid in any year shall exceed ——— per cent. per annum upon the amount of the purchase money which shall in any such year for the time being remain unpaid, such excess shall go and be applied in reduction *pro tanto* of the principal of such purchase money.

If the said party of the second part shall fail to perform this contract, or any part of the same, said party of the first part shall, immediately after such failure, have the right to declare the same void, and retain whatever may have been paid on said contract, and all improvements that may have been made on said premises, as settled and liquidated damages, and may consider and treat the party of the second part as his tenant holding over without permission, and may take immediate possession of the premises, and remove the party of the second part therefrom.

And it is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties. In witness, etc.

Form 569.

Agreement for Purchase of Farm. Purchaser to Take Possession.

This agreement made this ——— day of ———, A. D. 19—, between A. B. of ———, of the first part, and C. D. of ———, of the second part, witnesseth:

The said party of the first part, in consideration of the sum of ——— dollars, to be paid to the said party of the first part, and of the covenants to be performed by the said party of the second part, as hereinafter expressed, hereby agrees to sell to the said party of the second part all that certain tract of land situated in the township of ———, county of ———, and state of ———, known and described as follows, etc., with the privileges and appurtenances thereunto belonging.

The said party of the second part, in consideration of the covenants herein contained on behalf of the said party of the first part, agrees to purchase of the said party of the first part the above described land, and to pay for the same to the said party of the first part or his legal representatives the sum of ——— dollars,

in manner following, that is to say, etc., with interest, to be computed from the date of these presents, at the rate of ——— per cent. per annum on the whole sum that shall be from time to time unpaid, and to be paid annually; both principal and interest to be paid at ——— aforesaid; said party of the second part also agrees that he will, so long as any part of the principal or interest of the said consideration money remains unpaid, well and faithfully in due season, in each and every year, pay or cause to be paid all taxes and assessments, ordinary and extraordinary, that may for any purpose whatever be levied or assessed on said premises or on this contract; and that he will not commit, or suffer any other person to commit, any waste or damage to the said lands or the appurtenances except for firewood or otherwise for his own use, or while clearing the lands for cultivation in the ordinary manner.

That said party of the first part further covenants and agrees with the said party of the second part that upon the faithful performance by the said party of the second part of the covenants and agreements by him to be performed, and upon the payment of the several sums of money above mentioned, and the interest thereon, at the times and in the manner and at the place above mentioned, to the said party of the first part, that thereupon the said party of the first part will well and faithfully execute and deliver a good and sufficient deed or deeds, and thereby convey to the said party of the second part, his heirs and assigns, a good and unincumbered title in fee simple to the above described premises with their appurtenances.

It is further mutually covenanted and agreed by and between the parties hereto, that the said party of the second part may immediately enter on the said land, and remain thereon and cultivate the same as long as he shall fulfil and perform all the agreements hereinbefore mentioned on his part to be fulfilled and performed, and no longer; and that if he shall, at any time hereafter, violate or neglect to fulfil any of said agreements, he shall forfeit all right or claim under this contract, and be liable to said party of the first part for damages, and shall also be liable to be removed from the said land in the same manner as is provided by the law for the removal of a tenant who holds over after the expiration of the time specified in his lease. And it shall be lawful for the said party of the first part, at any time after the violation or nonfulfilment of any of the said agreements on the part of the said party of the second part, to sell and convey the land, or any part thereof, to any other person whomsoever; and the said party of the first part shall not be liable in any way, or to any person, to refund any part of the money which he may have received on this contract, or for any damages on account of such sale. And it is

hereby expressly understood and declared that time is and shall be deemed and taken as an essence of this contract, and that unless the same shall, in all respects, be complied with by the said party of the second part at the respective times and in the manner above limited and declared, that the said party of the second part shall lose and be debarred from all rights, remedies, or actions, either in law or equity, upon or under this contract.

This contract is hereby declared to be binding on the respective representatives of the parties hereto. In witness, etc.

Form 570.

Agreement for Partition between Tenants in Common.

This agreement made this ——— day of ———, 19—, between A. B. of ———, of the one part, and C. D. of ———, of the other part.

Whereas ——— of ———, lately died intestate, possessed of certain lands, situate at ———, and shown on the plan hereto annexed, and leaving the parties hereto his only heirs at law, and whereas said parties have now agreed to make partition thereof between them, as hereinafter mentioned, so that their respective portions may thenceforth be held in severalty; now these presents witness that they, the said parties, for themselves and their respective heirs, executors, and administrators, hereby mutually agree that they severally will, on or before the ——— day of ——— next, make partition of the said premises between them, and that such partition shall be carried out according to the valuation of ——— of ———, land surveyor; and that they will severally be bound by his decision and award, which shall be made and delivered in writing, on or before the ——— day of ——— next; and also that they will, on or before the ——— day of ——— next, execute mutual deeds to each other, their heirs and assigns, of such part or parts of the said premises as shall be so awarded and allotted to them respectively; provided the said surveyor shall have then made his award, but if not, within ——— days next after the making and delivery thereof; and also that in such mutual deeds there shall be inserted a proper plan of the said premises, distinguishing by colors, quantities, and boundaries such parts of the said premises as shall have been so allotted and awarded to them respectively; and that the same shall afterwards be held and enjoyed by them respectively in severalty accordingly; and also that, in case any inequality shall happen on either

side, the party having the larger portion in value shall pay to the other of them such a sum as shall be awarded by the said surveyor as an equivalent thereto, which shall be paid to the other of them on the execution of such deeds as aforesaid; and also that the costs and expenses of and attending the said survey and partition and preparation and execution of said deeds (as well as of and attending the preparation and execution of these presents), and incident thereto, shall be, borne and paid by the said parties in equal moieties. In witness, etc.

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